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R.S.C., *Ord.* 59, *r.* 17 - - **Divl.Ct. 155**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

STONE *v.* BOREHAM.

1958
July 2, 3.

Lord Goddard C.J., Slade and Devlin JJ.

Shop—Sunday closing—Mobile shop—Whether part of road where van standing a "place" where retail trade carried on—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 47, 58, 74 (1).

The defendant was the owner of a motor-van equipped as a mobile shop. On Sunday, November 10, 1957, he stopped his van outside a house and sold a packet of tea to a customer. He was charged with carrying on retail trade at a place—being that part of a road situate outside the house—on a Sunday contrary to sections 47 and 58 of the Shops Act, 1950 [1]:—

Held, that (applying *Eldorado Ice Cream Co. Ltd.* v. *Keating* [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330) the van

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[1] Shops Act, 1950, s. 47: "Every "shop shall, save as otherwise pro- "vided by this Part of this Act, be "closed for the serving of customers "on Sunday."

S. 58: "The foregoing provisions "of this Part of this Act . . . shall "extend to any place where any retail "trade or business is carried on as if "that place were a shop, and as if in "relation to any such place the per- "son by whom the retail trade or "business is carried on were the "occupier of a shop."

S. 74 (1): "'shop' includes any "premises where any retail trade or "business is carried on."

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was not a "shop" within the meaning of section 74 (1) of the Act of 1950 and was not, therefore, a "place" where retail trade was being carried on within section 58 of the Act; and that it would be wholly fanciful to distinguish that case from the present by holding that the ground on which the van stood was such a place; accordingly, the defendant was not guilty of an offence.

Per Devlin J. The requirement of closure in section 47 makes it plain that the "place" referred to in section 58 is something which is fixed and not a place where a casual sale happens to be effected.

CASE STATED by East Suffolk justices sitting at Woodbridge.

On December 23, 1957, an information was preferred by the prosecutor, Oswald John Stone, against the defendant, Keith Ramon Boreham, that he on November 10, 1957, at Woodbridge in the County of East Suffolk, being the person then carrying on retail trade or business at a certain place being that part of Peterhouse Crescent, Woodbridge, situate outside the dwelling-house numbered 106, Peterhouse Crescent, did not close the said place for the serving of customers on that day being a Sunday in that he did sell a packet of tea at the place, that not being one of the transactions mentioned in the Fifth Schedule to the Shops Act, 1950, contrary to sections 47 and 58 of that Act.

The justices heard the information on January 9, 1958, and found the following facts:

The prosecutor was a Shops Act inspector authorized to institute proceedings on behalf of the East Suffolk County Council for offences under the Shops Act, 1950. The defendant, a retailer, was the owner of an Austin motor-van which was equipped as a mobile shop and was stocked with a variety of goods, including groceries and ice cream, for sale by retail by the defendant to members of the public. On Sunday, November 10, 1957, in the course of his trade or business, the defendant drove the van slowly along Clare Avenue and Peterhouse Crescent, Woodbridge, which was part of his normal Sunday round in the van. He advertised the presence of the van by means of musical chimes and he stopped the van at frequent intervals. Soon after 4.30 p.m. the defendant stopped the van in the roadway outside No. 106, Peterhouse Crescent, where he sold by retail and delivered a packet of tea to a customer, who stood in the roadway and was served from the van. The defendant, who admitted the sale, sold the goods on Sundays because he understood that the provisions of the Shops Act, 1950, did not apply to mobile shops.

It was contended on behalf of the prosecutor that the part of Peterhouse Crescent which was occupied by the stationary van at

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the time of the sale was a place within the meaning of section 58 of the Act of 1950; that the defendant was carrying on a retail trade or business at that place, and that he was therefore guilty of the offence charged.

It was contended on behalf of the defendant that the portion of the road occupied by the stationary van was not a place within section 58; that the sale was effected in the van and not in the roadway and that the van was not a place within the meaning of the section; that the defendant was therefore not guilty of an offence.

The justices were of opinion, having regard to the decision in *Eldorado Ice Cream Co. Ltd.* v. *Keating*,[2] that: (a) A place within the meaning of section 58 of the Act of 1950 must be premises akin to a shop; that section 74 provides that " 'shop' includes any " premises where any retail trade or business is carried on."

(b) It was alleged that the offence was that retail trade or business was carried on on an undefined portion of the public highway and that that place was not closed for the serving of customers on a Sunday. It was not alleged that the mobile van while temporarily stationary was a place within the meaning of the Act in view of the decision in the *Eldorado* case.

(c) On the facts found the charge as contained in the information against the defendant could not be sustained.

The prosecutor appealed.

L. K. E. Boreham and *Mark Dyer* for the prosecutor. *Eldorado Ice Cream Co. Ltd.* v. *Keating*[3] is wrongly decided and the ratio cannot be supported. [Reference was made to the definition of "shop" in section 74 of the Act of 1950, and also to sections 47 and 58.] If "premises" is to have a restricted meaning as in the *Eldorado* case, then "place" has a much wider meaning. [Reference was made to the definitions in the Shops Acts of 1912 and 1936.]

In *Cowlairs Co-operative Society* v. *Glasgow Corporation*[4] it was held that it was to be implied from the definition of "shop" that trade was carried on from premises and therefore a van was not a shop.

[LORD GODDARD C.J. That case is directly in point.]

[SLADE J. You say *Eldorado* was wrongly decided because it says "any place"?]

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[2] [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330.

[3] [1938] 1 K.B. 715.

[4] 1957 S.C.(J.) 51.

It did not distinguish between "place" and "shop or "premises." In *Nixon* v. *Capaldi*[5] it was held that selling from a van on the public highway was carrying on retail trade in a "place."

[Lord Goddard C.J. How can those two cases be reconciled?]

Cowlairs's case did not decide whether the van was a "place," because the court was not asked to decide that. The court only had to decide whether it was a shop or premises. In *Nixon's* case the court had to decide whether it was a "place." In *Cowlairs's* case the charge was that they did sell "in a place not "being a shop." The point which is argued in the present case did not come up for argument there. In that case the defendants argued that it was a shop. If they had succeeded they would have escaped. In *Nixon's* case the charge was also that of carrying on retail trade in "a place not being a shop." In that case the contest was "Was it a place or not?" In *Cowlairs's* case the contest was "Was it a shop?" In *Nixon's* case reliance was placed on the *Eldorado Ice Cream* case. That is where the error has crept in.

[Devlin J. Which do you say is the place, the van or the ground on which it stands?]

The ground on which the van stands.

[Devlin J. Then how can you close it? The defendant is charged with opening it.]

He has opened the business at the place. The Acts of 1912, 1936 and 1950 all define a shop in exactly the same terms. In the Act of 1936 the definition was imported from the Act of 1912. Where, for instance, in section 9 of the Act of 1912, section 13 of the Act of 1936 and section 58 of the Act of 1950 one has a reference to "a place" where business is carried on, the word "place" has the same meaning in each of those sections.

[Lord Goddard C.J. If the information had charged the defendant with carrying on business in a place other than a shop, it would have been all right: see section 12 of the Act of 1950.]

That section comes under Part I of the Act. The defendant could only be charged under Part IV of the Act, which deals with Sunday trading. The inelegance of the phraseology is forced upon the prosecution by the Act. Closing cannot be taken literally. It must be related to the serving of customers, the carrying on of business. One can just as well do that in a street as in a shop. "Place" is wide enough to embrace street traders. [Reference was made to section 53 of the Act, referring to the Jewish Sabbath.] My submission is supported by *Nixon* v. *Capaldi*: see *per* the Lord Justice-Clerk that "a place is something more than "premises." In the *Eldorado* case Lord Hewart C.J. had limited it to premises.

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[5] 1949 S.C.(J.) 155.

[Lord Goddard C.J. This is an Act which affects a very large number of comparatively humble people. Is there any case yet which has applied this Act to a mobile place of business?]

Yes, *Nixon* v. *Capaldi*. The fact that the decision there was under the Act of 1912 makes no difference. If the Lord Justice-Clerk is right in *Cowlairs's* case, and it is submitted that he is, that involves that a van is not a shop, but the charge there was selling in a place not being a shop. In *Nixon's* case the charge, although laid under section 9 of the Act of 1912, was exactly the same as the charge here. "Place" is described as that part of the roadway. The Scottish decisions are correct. One cannot charge a person selling from a van as selling from a shop or premises.

C. J. Crespi for the defendant. If one has a van merely stopping to effect a particular sale, the fact that it stops at a particular spot does not make that spot a place within the section. If the argument of the prosecutor is correct, every spot where the van stops would be a place where he carries on his trade or business. That would be inconsistent with the provisions of the Shops Act. He would be put in the position of having to register every place where he stopped, and that is not the intention of the Act. The position of a Jewish trader would be impossible. The words of section 58 are not "every place at which a retail "sale is made," but "any place where any retail trade . . . is "carried on." It would be quite wrong to say that a pedlar walking round the streets selling goods was carrying on business at each place where he called. It would be different if he stood at one spot for several hours. The question is whether customers are coming to you or you are going to customers and touring the streets. It would be quite inconsistent with the Act to regard the matter on the basis that the whole street is a place.

As to the Scottish cases, the Scottish courts did not have before them the difficulty which arises here about closing a place, because in the Scottish cases the charge was that it should not be lawful to carry on any trade or business. That language is different from section 47 of the Act of 1950. In the *Eldorado* case a different view was taken. If there are two different decisions the *Eldorado* case should be followed. Lord Hewart C.J.

does not only refer to the particular sections of the Act which were referred to him. He says[6] "throughout these sections." He is saying in fact that the whole of the Shops Act, 1950, or its predecessors is limited to places which have fixed localities. If the Scottish cases were right in saying that a mobile van is not a shop because it had not got a fixed locality or position, then a place must also have a fixed locality or position. The real issue is whether the justices ought to have found on the facts whether the business was being carried on at the spot at which this van stood. The spot on the highway may have been capable of being a place. It is submitted that the *Eldorado* case is binding on the court. The only distinction between that case and the present is that there it was a box-tricycle and here it is a van. On the question of fixed locality Part IV of the Act of 1950 is not dealing with movable objects at all. That reinforces the words of Lord Hewart C.J. in the *Eldorado* case.

Boreham replied.

LORD GODDARD C.J. This matter came before a lay bench of magistrates at Woodbridge, and I pay tribute to the care they gave to the case. I have come to the conclusion that their decision was right. [His Lordship referred to the magistrates' decision and continued:] I have no doubt that as the Shops Act, 1950, was intended to prohibit and regulate Sunday trading, it might be a very good thing from the public point of view if it could be said that these mobile vans came within the Act. The shopkeeper has to close his shop on Sundays and if the owner of a mobile van can go round and sell from his van it may be that that is unfair competition and undesirable, but that is not a matter for this court. We have to see whether on the construction of the Act and the cases which are binding on this court an offence has been committed.

The various Shops Acts are consolidated in the Shops Act, 1950, and that is the Act which we have to construe. Section 47 provides: "Every shop shall, save as otherwise provided by this "Part of this Act, be closed for the serving of customers on "Sunday." Section 74, which is the definition section, provides: "'shop' includes any premises where any retail trade "or business is carried on." Observe that that is not a precise definition; it says that it "includes" certain premises and does not therefore exclude other matters. Section 58 provides: "The

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[6] [1938] 1 K.B. 715, 742.

"foregoing provisions of this Part of this Act . . . shall extend "to any place where any retail trade or business is carried on as "if that place were a shop, and as if in relation to any such place "the person by whom the retail trade or business is carried on "were the occupier of a shop."

I say at once, both with regard to the definition of "shop" in section 74 and section 58, that the effect of those sections is not to say that a retail trade or business is carried on in a mobile shop. At a mobile shop no doubt retail sales are made, but that is different from saying that a retail trade or business is carried on. A man carries on business from an address. I do not think those words apply to a mobile van of this sort. It is unnecessary to examine in detail the various Shops Acts or the Scottish cases on this subject, because in my opinion the decision of this court in *Eldorado Ice Cream Co. Ltd.* v. *Keating*,[1] on which the justices relied, is binding on us. Whether, if the case was res integra, we might come to a different decision I need not inquire. In the *Eldorado* case, which was decided under the Shops (Sunday Trading Restriction) Act, 1936, a box-tricycle from which ice-cream is sold, was attacked as a retail shop, and there is no difference between a mobile van and a tricycle. The distinction sought to be drawn here is that, whereas the court held in the *Eldorado* case that the tricycle could not be a shop within the definition or extension section in the Act, it left open the question whether a place, that is to say, the actual piece of ground upon which the tricycle stood, could be held to be a shop. That is why, as Mr. Boreham in his very well-sustained argument told us, the information in the present case charged the defendant with selling from a place, which was the piece of ground in front of a house in the street. It seems to me that that is not a place where the defendant had set up business or had established himself as people do at the side of a road on Sundays where they put out a table and sell flowers or fruit. It was simply the place where he stopped, and it would be fanciful to distinguish the present case from the *Eldorado* case on the ground that the *Eldorado* case was dealing with a charge which alleged that a man sold from a tricycle and in this case it is said he sold from a place, namely, where the tricycle or van stopped. We must try to construe these matters in a way which the public can understand. The *Eldorado* case clearly decides that a moving vehicle such as a tricycle is not brought within the provisions of this Act, and therefore it would be wholly artificial to say that the place at which a tricycle comes to a stand is brought within the Act. No doubt the appropriate Government Department which has to deal with these matters may take into account that this court holds that these mobile shops are not within the Shops Act, 1950, in consequence of the decision in the *Eldorado* case in 1938 after which the law could have been altered when the Shops Act, 1950, was passed.

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[1] [1938] 1 K.B. 715; 54 T.L.R. 356; [1938] 1 All E.R. 330.

For these reasons, I am of opinion that the justices were right in holding that they were constrained by the *Eldorado* case to hold that an offence had not been committed and that therefore this appeal fails and must be dismissed.

SLADE J. I agree that this appeal fails because this court is bound by the decision of the Divisional Court in *Eldorado Ice Cream Co. Ltd.* v. *Keating*.[2] I respectfully agree with my Lord that it would be too fanciful to draw a distinction between a box-tricycle and the land on which the box-tricycle stood at the time the retail sale was effected, and of course the same applies in this case to a motor-van. Had the matter been res integra, I am bound to say that I should have come to a different conclusion. Section 47 of the Shops Act, 1950, provides: "Every shop shall, "save as otherwise provided by this Part of this Act, be closed "for the serving of customers on Sunday." A shop is defined by section 74 (1) as including any premises where any retail trade or business is carried on. In a sense, therefore, the expression "shop" may be said to be linked to the word "premises." Then one has section 58 of the Act of 1950, the rubric of which is: "Extension of foregoing provisions of Part IV to retail trading "elsewhere than in shops," and that means elsewhere than in shops as defined by section 74 (1). Section 58 enacts that the provisions shall extend to any place where any retail trade or business is carried on. I think the intention of that Act, as was the intention of the Act of 1936 under which the *Eldorado* case was decided, was to prohibit Sunday trading by retail save for the exceptions provided for in the Act, and I would have given the word "place" in the extension provisions of the Act of 1950 the widest possible interpretation. I am fortified in taking that view by the decision of the High Court of Justiciary in Scotland in 1949 in *Nixon* v. *Capaldi*.[3] It is true that that was a decision under section 9 of the Shops Act, 1912, which had no relation to Sunday trading, but which brought the conditions of employment in shops into line with the conditions of employment in factories. But there is no distinction, in my view, so far as the relevant wording is concerned, and the High Court of Justiciary in that case came to a decision on the meaning of the word "place" which in my view cannot be reconciled with the meaning applied to it in the *Eldorado* case.[4] I refer to *Cowlairs Co-operative Society* v. *Glasgow Corporation*,[5] to which Mr. Boreham in his admirable argument drew our attention, in order to say that I see nothing in that decision which conflicts with the decision in *Nixon* v. *Capaldi*.[6]

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[2] [1938] 1 K.B. 715.

[3] 1949 S.C.(J.) 155.

I should again like to emphasise, as the present Chief Justice has done in this court on more than one occasion, the desirability of allowing within limits an appeal beyond this court in a criminal cause or matter, since as the law stands at present no further appeal lies. I agree that this appeal should be dismissed.

DEVLIN J. I agree. Three attempts have now been made to bring mobile vans which act as shops within the purview of the Shops Acts which have been consolidated in the Act of 1950. In the first place it has been suggested that a mobile van which is fitted up as a shop is in the popular sense of the word a shop and therefore quite capable of being brought within the Act. The definition in the Act, it is argued, is not comprehensive; it says that a shop includes premises, and there is no reason therefore why mobile vans should not be treated as shops for the purposes of the Act. I confess a great deal of sympathy with that argument, but it has not been very fully explored and, I think, rightly so, because it came before the Scottish court in the *Cowlairs* case.[7] That very argument was put up, and it was there rejected; and it seems to me most desirable wherever possible for the sake of uniformity of decisions under these statutes that we should follow the decisions of the Scottish courts, and that excludes that argument. The second way of bringing it within the Act is to suggest that the van itself or the tricycle, or whatever it may be, is a place where retail trade or business is carried on. By section 58 the provisions of the Act of 1950 are extended to any place where any retail trade or business is carried on as if that

[4] [1938] 1 K.B. 715.
[5] 1957 S.C.(J.) 51.
[6] 1949 S.C.(J.) 155.
[7] 1957 S.C.(J.) 51.

place were a shop. That failed in the *Eldorado* case [8] and consequently it has not been suggested again here. The third way of doing it is to say that the place for the purposes of section 58 is not the van or tricycle, but the ground on which the van or tricycle stands, and that way of bringing the thing within the Act has received the support of *Nixon* v. *Capaldi.*[9] I agree with Mr. Boreham that one can distinguish the *Eldorado* case [10] on that ground because Lord Hewart C.J. in the *Eldorado* case said specifically that that argument as to the meaning of the word "place" had not been brought before the court and he was not dealing with it. But I agree also with Lord Goddard C.J. and Slade J. that such a distinction would be to introduce too nice reasoning, and it would also mean that a great deal of the argument and submissions that commended themselves to Lord Hewart C.J. and on which he based his judgment in the *Eldorado* case would be erroneous. Therefore, having to choose in that way between the *Eldorado* case and *Nixon* v. *Capaldi* [11] I choose the *Eldorado* case; and I have the less hesitation in doing so because I find difficulty in appreciating the basis of the decision in *Nixon* v. *Capaldi* and much prefer the view that the ground on which the van or tricycle stands is not a place within the meaning of section 58. I can state my reasons for that quite briefly. The Act is to extend not to any place where the sale happens to be effected but to a place where the retail trade or business is carried on. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. It might also have been a dozen or a score of similar places where other sales happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? I think so to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense. There are many sections of the Act which seem to me to make it clear that section 58 has in mind a place where business is carried on in the ordinary sense of the word and not where any trader happens to effect a sale in the course of his business, there being to my mind a clear distinction between the two. No better section could be introduced as illustrative of that than the very section under which this prosecution was brought, section 47, which says: "Every shop shall, save as otherwise provided by "this Part of this Act, be closed for the serving of customers on

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[8] [1938] 1 K.B. 715.

[9] 1949 S.C.(J.) 155.

[10] [1938] 1 K.B. 715.

[11] 1949 S.C.(J.) 155.

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"Sunday." The requirement of closure makes it plain that the place is something which is fixed, a place where business is carried on, and not a place where a casual sale happens to be effected. I think the ordinary man could not make sense of a requirement of the law that he was required in the words of this information to close a place being a part of Peterhouse Crescent outside the dwelling-house No. 106. I think it is very undesirable that this court should strain to give meanings to a section of the Act which would produce a result incomprehensible to the traders who have to deal with it. The result is, I think, that it must now be taken as definitely decided in these courts that a mobile van is not a shop within the meaning of the Shops Act, 1950, and if Parliament desires to make it so it must introduce new legislation for that purpose.

Appeal dismissed.

Solicitors: *Berrymans for G. C. Lightfoot, Ipswich; Field, Roscoe & Co. for Gotelee & Goldsmith, Ipswich.*

J. D. P.

NATIONAL COAL BOARD v. GAMBLE.

1958
July 3, 4,
25.

Lord Goddard C.J.,
Slade and
Devlin JJ.

Criminal Law—Aiding and abetting—Mens rea—Coal Board official allowing overladen lorry to leave colliery—Lorry owner convicted of offence—Whether board guilty of aiding and abetting.

On October 3, 1957, M., the servant of a firm of hauliers, took his lorry to a colliery of the National Coal Board where it was filled with coal from a hopper and was then taken to a weighbridge, where the weighbridge operator H., who was employed by the board, weighed the lorry and its load and told M. that the load was nearly 4 tons overweight. M., saying that he would risk taking the overload, took the weighbridge ticket from H. and left the colliery premises. He was subsequently stopped by the police and his firm were later convicted of contravening the Motor Vehicles (Construction and Use) Regulations, 1955. It appeared that the hauliers were collecting the coal for carriage to a power station of an electricity authority, to whom the Coal Board were bound by contract to supply a bulk quantity of coal. The board were charged with aiding and abetting the firm in the commission of an offence:—

Held (Slade J. dissenting), that the crime of aiding and abetting was committed on proof of a positive act of assistance voluntarily done, and a knowledge of the circumstances constituting the offence, the question of motive was irrelevant; that the property in the coal did not pass to the buyer until the coal was weighed and the weighbridge ticket handed to M., and the completion of the sale of the coal at that moment by H. as agent for the board, with the knowledge that an offence was going to be committed constituted the board aiders and abettors.

Ackroyds Air Travel Ltd. v. *Director of Public Prosecutions* [1950] 1 All E.R. 933 applied.

Per Slade J. The prosecution must prove that the act or omission on which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

Case stated by Derby justices sitting at Chapel-en-le-Frith.

At a court of summary jurisdiction an information dated November 29, 1957, was preferred by the prosecutor, William Edward Gamble, under section 35 of the Magistrates' Courts Act, 1952, against the National Coal Board that they, on October 3, 1957, at Peak Forest, Derby, unlawfully did aid, abet, counsel and procure H. Wilson & Sons (Mosboro) Ltd. to commit a certain offence, that is to say, to unlawfully use a heavy motor-lorry with six wheels on Chesterfield Road, the sum of the weight transmitted to the road surface by all the wheels of which lorry exceeded 20 tons, contrary to regulations 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The information was heard by the justices on January 30, 1958, when the court convicted the board and fined them £3.

By paragraph 4 of the case the justices found the following facts:

(a) On October 3, 1957, a registered motor-lorry with six wheels was stopped by the police on Chesterfield Road. The gross weight of the lorry and its load was found to be 23 tons 11 cwts. The lorry was driven by one Mallender, the servant or agent of H. Wilson & Sons (Mosboro) Ltd., who owned the lorry. This firm were convicted and fined under regulations 68 and 104 of the regulations of 1955.

(b) The lorry was loaded at the board's premises at Cotes Park Colliery, Somercotes.

(c) The method of loading was as follows: Mallender took his empty vehicle to a hopper at the board's premises which was operated by a servant of the board. Mallender told the hopper operator when to stop loading.

(d) Mallender then took his lorry to the board's weighbridge at the premises to weigh the load.

(e) The weighbridge operator, one Haslam, employed by the board, weighed the lorry and its load and informed Mallender that his load was nearly 4 tons overweight.

(f) Mallender was asked by Haslam whether he intended taking the load and Mallender, after joking about his overload, said that he would risk it and took the weighbridge ticket from Haslam and left the premises.

(g) The weighbridge ticket which was produced by Mallender showed the gross weight of the lorry and its load was 23 tons 18 cwts., the tare weight of the lorry was 8 tons 6 cwts. and the net weight of the coal was 15 tons 12 cwts.

(h) The weighbridge ticket was addressed by the board to the Central Electricity Authority at Carrington.

(i) On the door of the weighbridge ticket office there was a large notice displayed to the effect that owners and drivers of vehicles were warned that the National Coal Board were not responsible for the use of any vehicle on the road which was loaded beyond its authorized capacity.

(j) Off-loading facilities were provided by the colliery and Mallender knew well that he could have off-loaded into another vehicle if he so desired, and that he had done this on previous occasions, but on this occasion he had a new lorry, with which he thought he could drive with an overload without risk.

(k) It was not the practice for the board's servants to give orders of any sort to drivers but they were requested to act in accordance with accepted practice at the colliery in respect of loading and weighing vehicles.

(l) The justices accepted Mallender's evidence that if he had not received his weighbridge ticket he did not think he could have gone off the colliery, but that the Coal Board had no control over his actions. He believed he could do what he liked as regards loading and what he carried on his vehicle and that, if he had not been given a ticket, there would have been trouble, as he knew that he could demand a weighbridge ticket " on rule."

(m) The board did not call evidence and submitted that there was no case to answer.

On the part of the board it was contended that they were under a duty under section 21 of the Weights and Measures Act, 1889, to issue a weighbridge ticket to Mallender, and that if he had left their premises without a ticket and had in due course unloaded the lorry, they would have been guilty of an offence under that Act. That the board had informed the driver that he was overloaded and that, on his evidence, there would have been trouble if Haslam had not issued a ticket. That the board had no direct control over the driver, and that when the handing over of the ticket was otherwise explicable an intention to aid and abet in the commission of an offence must be affirmatively proved, but that the facts, together with the notice displayed by the board, indicated that the board's sole intention was to carry out an administrative act which they were under a legal duty to perform under the Weights and Measures Act, 1889, and that no intention to aid, abet, counsel or procure the commission of the offence had been proved.

On behalf of the prosecutor it was contended that the substantive offence against the regulations of 1955 was one of absolute liability, and that aiding and abetting the commission of an offence against the regulations was also one of absolute liability. That it was only necessary to prove that the board's servants had full knowledge of the facts which constituted the substantive offence and did acts which assisted the commission of that offence.

The justices drew the following inferences:

1. From the handing over of the weighbridge ticket by Haslam to Mallender the board were bound by contract to supply a certain bulk quantity of coal to the Central Electricity Authority at Carrington Power Station.

2. From the evidence of Mallender that he could have offloaded some of the coal into another vehicle and then reweighed his lorry, that the coal taken from the hopper into Mallender's lorry remained the property of the board until it had been weighed and offered by Haslam and accepted by Mallender as part of the bulk coal sold to the electricity authority, and until the weighbridge ticket had been handed over in token.

3. From the form in which the weighbridge ticket was drawn, that it was a delivery note and was the authority to H. Wilson & Sons (Mosboro) Ltd. to take and deliver the amount of coal stated therein to the electricity authority.

The justices were of opinion that Haslam, on behalf of the board, could and ought to have refused to hand over to Mallender the ownership of 15 tons 12 cwts. of coal, knowing that Mallender proposed to use this coal in such a way as to break the law, and that the handing over of the weighbridge ticket in these circumstances constituted the offence of aiding and abetting. The board appealed.

John Thompson Q.C. and *Denis Cowley* for the National Coal Board. It is said that this is a matter of absolute liability and that the board, by not retaining the coal on their premises, were constituted aiders and abettors. If this is right it is an extension

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of the principle governing the aiding and abetting of a crime. Haslam was bound under the Weights and Measures Act, 1889, s. 21, to issue a weighbridge ticket to Mallender. The board's servant who put their coal on the lorry had neither the knowledge that the load was overweight nor, if it turned out to be overweight, that Mallender would refuse to unload it. Unless there was knowledge plus the motive to further the crime the board cannot be held guilty of an offence.

[DEVLIN J. Up to the moment that the property passes the board can order the coal to be unloaded.]

Haslam could not order Mallender to unload without being in breach of contract. Merely to sell coal did not involve including in the contract that no lorry shall carry an overweight. [Reference was made to the Sale of Goods Act, 1893, ss. 17 and 18, rules 1 and 2.] The board could not be required to see that Mallender did not leave the premises overloaded. That could only be so in a case of master and servant. Once the lorry is loaded rule 5 (2) of section 18 of the Act of 1893 applies, and there is no power to detain the driver. If the property has not passed, the board is entitled to stop the lorry from leaving the premises and to demand back their property. The question is: Is the board obliged to do so because, if it does not do so, it will be held to have aided and abetted?

For the board to be guilty of aiding and abetting there must be some coincidence of purpose. In *Reg.* v. *Coney*,[1] in which the defendants were charged with aiding and abetting an illegal prize fight, it was held that the mere voluntary presence of persons at a prize fight did not necessarily make them guilty of aiding and abetting. Hawkins J. said[2] that to constitute an aider and abettor, some active steps must be taken by word or action, with the intent to instigate the principal. Encouragement did not necessarily amount to aiding and abetting. Only if a person encouraged intentionally by expressions intended to signify approval did he aid and abet. Here Haslam did not intend to signify his approval. In *Rex* v. *Lomas*[3] it was made clear that mere knowledge of an intended crime was not sufficient to constitute a person an accessory. [Reference was made to *Reg.* v. *Bullock*.[4]] There must, in some degree, be a joining in the enterprise; it is not sufficient for a person merely to be aware

[1] (1882) 51 L.J.M.C. 66.

[2] Ibid. 78.

[3] (1913) 9 Cr.App.R. 220; 30 T.L.R. 125.

[4] [1955] 1 W.L.R. 1; [1955] 1 All E.R. 15.

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that an offence is going to be committed, even though it may be within his power to prevent it. The reasons given in the opinion of the justices do not sustain the conclusion reached.

Piers Ashworth for the prosecutor. There was sufficient evidence before the justices to justify a conviction. The property in the coal did not pass until after the giving of the weight ticket, even applying the rules in section 18 of the Sale of Goods Act, 1893. For under those rules the coal has to be in a deliverable state before the property in it can pass. Section 62 (4) of the Act of 1893 says that goods are in a deliverable state when they are in such a state that the buyer is bound to take delivery of them. Section 21 of the Weights and Measures Act, 1889, requires a seller of a consignment of more than 2 cwt. of coal to deliver a ticket or note in accordance with the Act. If the seller attempted delivery without such a ticket, the buyer could refuse to accept the goods without committing a breach of contract. The goods were not in a deliverable state until there was a weight ticket in existence. The weight ticket was a condition precedent to the passing of the property. The goods were unconditionally appropriated to the contract when they had been weighed and there was some act of assent by the Coal Board thereafter.

There is no dispute that the lorry went on the road overloaded, that it was known to be overloaded, and that the Coal Board's servant handed over the weight ticket to the driver, thus transferring the property in the coal to the electricity authority. That was more than enough to constitute the offence of aiding and abetting. The requirement imposed in *Ackroyds Air Travel Ltd.* v. *Director of Public Prosecutions*[5] that a person convicted as an aider and abettor must know of all the circumstances constituting the offence, it being immaterial whether he knew there was an offence, has been fulfilled. It has been contended that the sole purpose of the giving of the ticket was the performance of a statutory duty; there was no duty to deliver a ticket in the case of an overloaded lorry. The ticket also acted as an authority to the driver to leave the premises, and thereby facilitated the driver's exit and facilitated the offence. Allowing the driver to pass out of the premises was not simply a passive act; it was a positive act of aiding the offence. To put it in another way, if the driver left with the coal before the issue of a weight ticket, he might be guilty of larceny.

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[5] [1950] 1 All E.R. 933, 936.

[LORD GODDARD C.J. The delivery was not complete until the issue of the ticket. Under the contract the Coal Board were not bound to deliver any particular quantity of coal. If, on filling up the lorry with coal, they find they have loaded more than 20 tons and yet issue a ticket, you say that is an encouragement.]

Yes, and in any event, if the Coal Board adopt a system of loading lorries, so that they cannot ascertain the weight of the coal until after loading, it is their duty to off-load if the permitted weight is exceeded. The adoption of a system by which they risk overloading makes them guilty of aiding, if in fact they have overloaded. In *Churchill* v. *Norris* [6] the driver of a lorry, judging the weight of timber by its size, thought that he had loaded a permitted quantity; in fact he had loaded an excessive quantity. His employer was found guilty of permitting a lorry to be driven when overloaded. He had taken the risk of overloading. It is true that the present case can be distinguished from *Churchill* v. *Norris* [6] because there the offence was one of permitting, and the employer was the owner of the offending lorry, but, even so, the same principle applies. In *Provincial Motor Cab Co. Ltd.* v. *Dunning* [7] a regulation made by the Board of Trade provided that whenever during the hours of darkness a vehicle was used on the highway a lamp should be fitted. The defendant company employed a foreman to ensure that its cabs complied with the regulation, but nevertheless it was convicted of aiding one of its drivers when he contravened the regulation. The company adopted a careless system of supervising its cabs.

[LORD GODDARD C.J. If the lorry had been owned by the Coal Board, the case might be the same.]

Even though the defendant company in that case were the owners of the cab, the same principle applies. The Coal Board loaded the lorry, and the Coal Board should have unloaded the excess quantity of coal.

Thompson Q.C. in reply. The justices failed to distinguish between doing something to assist and doing something which assists. The justices must look at the mind of the person alleged to aid the offence, and determine what the purpose of the alleged aiding was. It is not enough to say that the giving of the weight ticket completed the passing of the property and facilitated the exit of the driver. Was the giving of the ticket referable to the purpose of promoting the commission of the offence, or was it given because of a belief that its issue was part of a contractual obligation? The issue of the ticket was so equivocal that it does not necessarily lead to an inference of assisting the offence.

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[6] (1938) 158 L.T. 255.

[7] [1909] 2 K.B. 599.

Cur. adv. vult.

July 25. The following judgments were read.

Lord Goddard C.J. stated the facts and continued. In *Ackroyds Air Travel, Ltd.* v. *Director of Public Prosecutions*,[1] I stated the law with regard to aiding and abetting in this way: " . . . a person could only be convicted . . . as an aider and " abettor if he knew all the circumstances which constituted the " offence. Whether he realized that those circumstances con-" stituted an offence was immaterial. If he knew all the " circumstances and those circumstances constituted the offence " . . . that was enough to convict him of being an aider and " abettor." Humphreys J. in the same case said[2]: " . . . it " must be shown that the unlawful act has been committed, and, " therefore, that the offence has been committed, and, further, " that the person charged as an aider and abettor was aware " of the facts sufficiently to enable him to know that the act " was unlawful."

To enable one to decide whether the board were properly convicted as aiders and abettors it seems to me necessary to decide in the first instance when the property in the coal had passed. This was a sale of unascertained goods and the property in those goods passes on a sale when the parties intend it should pass, and rules are set out in section 17 of the Sale of Goods Act, 1893, for enabling the court to determine when property passes subject, of course, to the intention of the buyer and seller. In my opinion it is quite clear that neither side could have intended the property in the coal to pass when it was put from the hopper into the lorry. The quantity would have to be ascertained in order to enable the price to be ascertained. The lorry is then taken to the weighbridge to be weighed and in my opinion no sale takes place whereby the property is passed until the weighing is completed and assented to by the buyer, and this is shown by the handing to him and the acceptance by him of a weighbridge ticket. In my opinion, therefore, no property passed until the weighbridge ticket was accepted by Mallender.

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[1] [1950] 1 All E.R. 933, 936.

[2] Ibid.

As soon as Haslam weighed the coal he knew it was overweight and called Mallender's attention to that fact. From Mallender's answer he knew that Mallender intended to drive the overweighted lorry on the highway and with that knowledge he completed the sale and handed the weight ticket to Mallender whose duty then was to give it to the purchasers, namely, the Central Electricity Authority. Haslam could, in my opinion, have refused to allow the overweight amount of 3 tons 18 cwts. to leave the colliery. No specific amount had been asked for. The board were no doubt bound to deliver coal to the electricity authority under their contract, but were not bound to deliver any particular amount of coal at any particular moment.

The justices drew the inference, and it was not disputed, that the board were bound by contract to supply a bulk quantity of coal to the authority. It was urged on behalf of the board that they had no right to require Mallender to unload the coal or rather the excess, but with this I cannot agree. For the reasons I have already given the property had not passed until the delivery was completed, and it could only be completed by the weighing and the delivery and acceptance of the ticket.

Suppose a purchaser took his lorry to the hopper and asked for 10 tons of coal or the Coal Board had offered to supply him with 10 tons of coal. Nobody would know how much the hopper delivered until it had been weighed. If it was found that more than 10 tons had been put into the lorry it seems to me beyond question that the board could insist upon the excess being taken out. Here no specific amount was asked for, but the board, by their servant, knew that more had been put into the lorry than could be lawfully carried on the road and with that knowledge completed the sale. In my opinion that amounted to an aiding and abetting of the offence, as Haslam knew Mallender was going there and then to drive the lorry on the highway, in other words, a specific offence was contemplated.

In this connexion I would refer to *Reg.* v. *Bullock*,[3] where *Rex* v. *Lomas*[4] was distinguished. In so holding I do not think an undue burden is placed on the Coal Board; if their weighbridge operators are instructed to refuse to give a weight ticket to the driver of a lorry which with its load exceeds the permitted maximum and the latter nevertheless drives away with the load, the board will not have aided or abetted the offence. Compliance with the requirements of the Weights and Measures Act, 1889, can be made by posting the ticket to the purchaser. The Coal Board obviously desire to maintain that the overloading of customers' lorries is no concern of theirs, but in that I cannot agree. The object of the legislation is to protect the roads of the country from damage to which the board would directly contribute if they allow excessive weight to be taken from their premises. In my opinion the justices came to a right decision in point of law and I would dismiss this appeal.

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[3] [1955] 1 W.L.R. 1; [1955] 1 All E.R. 15.

[4] (1913) 9 Cr.App.R. 220; 30 T.L.R. 125.

I will now ask Devlin J. to read his judgment and then I will read Slade J.'s dissenting judgment.

DEVLIN J. A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. I use the word " supplies " to comprehend giving, lending, selling or any other transfer of the right of property. In a sense a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article. But this has never been held to be aiding in law: see *Rex* v. *Lomas*[5] and *Reg.* v. *Bullock.*[6] The reason, I think, is that in the former case there is in law a positive act and in the latter only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking. But a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue. Thus in law the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony. Another way of putting the point is to say that aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done.

These considerations make it necessary to determine at what point the property in the coal passed from the board and what the board's state of knowledge was at that time. If the property had passed before the board knew of the proposed crime, there was nothing they could legally do to prevent the driver of the lorry from taking the overloaded lorry out onto the road. If it had not, then they sold the coal with knowledge that an offence was going to be committed.

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[5] 9 Cr.App.R. 220.

[6] [1955] 1 W.L.R. 1.

The board called no evidence, so that a good deal was left to inference; but the conclusions of fact reached by the magistrates have not been seriously disputed. The board had an instalment contract with the Central Electricity Authority for a supply of coal to be delivered at the colliery into lorries sent by a carrier on behalf of the authority. The quantity of each instalment was not prescribed and the inference is that the board were to deliver and the carrier to receive as much as each lorry could carry (which means, of course, as much as it could legally and safely carry) until the contract quantity was exhausted. The method of delivery was for the lorry to be loaded by hopper and then to proceed to a weighbridge; there were off-loading facilities if the load was found to be overweight. At the weighbridge a ticket was issued in accordance with the Weights and Measures Act, 1889, s. 21, which provides that where any quantity of coal exceeding 2 cwt. is delivered by means of any vehicle to any purchaser, the seller of the coal shall deliver or send by post to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note in the prescribed form.

On this occasion the carrier's lorry was driven by one Mallender and its maximum legal load (after allowing for the tare weight) was 11 tons 12 cwt. It was loaded at the hopper, Mallender telling the operator when to stop. Mallender then took the lorry to the weighbridge. The weighbridge operator, one Haslam, weighed the lorry and its load and informed Mallender that his load was nearly 4 tons overweight. Haslam asked Mallender whether he intended taking the load and Mallender said he would risk it; he then took the weighbridge ticket from Haslam and left the colliery.

In these circumstances, prima facie, the property in the coal passed on delivery to the carrier in accordance with rule 5 of section 18 of the Sale of Goods Act, 1893. If the delivery was complete after loading and before weighing, the board had not until after delivery any knowledge that an offence had been committed. But where weighing is necessary for the purpose of the contract, as, for example, in order to ascertain the price of an instalment, the property does not pass until the weight has been agreed. In *Simmons* v. *Swift*[7] the parties agreed to buy and sell "the bark stacked at Redbrook at £9 5s. per ton." It was held that the property did not pass until the bark had been weighed and the price ascertained. Bayley J. said[8] that the concurrence of the seller in the act of weighing was necessary and he might insist on keeping possession until the bark had been weighed.

It was contended on behalf of the board that Haslam had no option after weighing but to issue the ticket for the amount then in the lorry. I think that this contention is unsound. In the circumstances of this case the loading must be taken as subject to adjustment; otherwise, if the contract were for a limited amount, the seller might make an over-delivery or an under-delivery which could not thereafter be rectified and the carrier might be contractually compelled to carry away a load in excess of that legally permitted. I think that the delivery of the coal was not completed until after the ascertained weight had been assented to and some act was done signifying assent and passing the property. The property passed when Haslam asked Mallender whether he intended to take the load and Mallender said he would risk it and when the mutual assent was, as it were, sealed by the delivery and acceptance of the weighbridge ticket. Haslam could therefore after he knew of the overload have refused to transfer the property in the coal.

This is the conclusion to which the justices came. Mr. Thompson submits on behalf of the board that it does not justify a verdict of guilty of aiding and abetting. He submits, first, that even if knowledge of the illegal purpose had been acquired before delivery began, it would not be sufficient for the verdict; and secondly, that if he is wrong about that, the knowledge was acquired too late, and the board was not guilty of aiding and abetting simply because Haslam failed to stop the process of delivery after it had been initiated.

On his first point Mr. Thompson submits that the furnishing of an article essential to the crime with knowledge of the use to which it is to be put does not of itself constitute aiding and abetting; there must be proved in addition a purpose or motive of the defendant to further the crime or encourage the criminal. Otherwise, he submits, there is no mens rea.

I have already said that in my judgment there must be proof of intent to aid. I would agree that proof that the article was knowingly supplied is not conclusive evidence of intent to aid. *Reg.* v. *Fretwell* [9] is authority for that. *Rex* v. *Steane*,[10] in which the defendant was charged with having acted during the war with intent to assist the enemy contrary to the Defence Regulations then in force, makes the same point. But prima facie—and *Rex* v. *Steane* makes this clear also—a man is presumed to intend the natural and probable consequences of his acts, and the consequence of supplying essential material is that assistance is given to the criminal. It is always open to the defendant, as in *Rex* v. *Steane*, to give evidence of his real intention. But in this case the defence called no evidence. The prima facie presumption is therefore enough to justify the verdict, unless it is the law that some other mental element besides intent is necessary to the offence.

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[7] (1826) 5 B. & C. 857.

[8] Ibid. 863.

This is what Mr. Thompson argues, and he describes the additional element as the purpose or motive of encouraging the crime. No doubt evidence of an interest in the crime or of an express purpose to assist it will greatly strengthen the case for the prosecution. But an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that mens rea is a matter of intent only and does not depend on desire or motive.

The authorities, I think, support this conclusion, though none has been cited to us in which the point has been specifically argued and decided. The Lord Chief Justice has quoted the statement of the law in *Ackroyds Air Travel Ltd.* v. *Director of Public Prosecutions* [11] which is consistent with the results reached in the earlier cases of *Cook* v. *Stockwell* [12] and *Cafferata* v. *Wilson* [13] and with the later case of *Reg.* v. *Bullock*.[14] The same principle has been applied in civil cases where the seller has sued upon a contract for the supply of goods which he knew were to be used for an illegal purpose. In some of the authorities there is a suggestion that he could recover on the contract unless it appeared that in addition to knowledge of the purpose he had an interest in the venture and looked for payment to the proceeds of the crime. But in *Pearce* v. *Brooks*[15] Pollock C.B. stated the law as follows[16]: "I have always considered it as "settled law that any person who contributes to the performance "of an illegal act by supplying a thing with the knowledge that "it is going to be used for that purpose, cannot recover the "price of the thing so supplied. If, to create that incapacity, "it was ever considered necessary that the price should be "bargained or expected to be paid out of the fruits of the "illegal act (which I do not stop to examine), that proposition "has been overruled by the cases I have referred to, and has "now ceased to be law."

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[9] (1862) Leigh & Cave 161.

[10] [1947] K.B. 997; 63 T.L.R. 403; [1947] 1 All E.R. 813.

[11] [1950] 1 All E.R. 933.

[12] (1915) 84 L.J.Q.B. 2187.

[13] (1936) 53 T.L.R. 34; [1936] 3 All E.R. 149.

[14] [1955] 1 W.L.R. 1.

The case chiefly relied on by Mr. Thompson was *Reg.* v. *Coney*.[17] In that case the defendants were charged with aiding and abetting an illegal prize fight at which they had been present. The judgments all refer to "encouragement," but it would be wrong to conclude from that that proof of encouragement is necessary to every form of aiding and abetting. Presence on the scene of the crime without encouragement or assistance is no aid to the criminal; the supply of essential material is. Moreover, the decision makes it clear that encouragement can be inferred from mere presence. Cave J., who gave the leading judgment, said of the summing-up[18]: "It may mean either that mere "presence unexplained is evidence of encouragement, and so of "guilt, or that mere presence unexplained is conclusive proof of "encouragement, and so of guilt. If the former is the correct "meaning I concur in the law so laid down; if the latter, I am "unable to do so." This dictum seems to me to support the view I have expressed. If voluntary presence is prima facie evidence of encouragement and therefore of aiding and abetting, it appears to me to be a fortiori that the intentional supply of an essential article must be prima facie evidence of aiding and abetting.

As to Mr. Thompson's alternative point, I have already expressed the view that the facts show an act of assent made by Haslam after knowledge of the proposed illegality and without which the property would not have passed. If some positive act to complete delivery is committed after knowledge of the illegality, the position in law must, I think, be just the same as if the knowledge had been obtained before the delivery had been

[15] (1866) L.R. 1 Ex. 213.

[16] Ibid. 217.

[17] (1882) 8 Q.B.D. 534.

[18] Ibid.

begun. Of course, it is quite likely that Haslam was confused about the legal position and thought that he was not entitled to withhold the weighbridge ticket. There is no mens rea if the defendant is shown to have a genuine belief in the existence of circumstances which, if true, would negative an intention to aid; see *Wilson* v. *Inyang*.[19] But this argument, which might have been the most cogent available to the defence, cannot now be relied upon, because Haslam was not called to give evidence about what he thought or believed.

The fact that no evidence was called for the defence makes this case a peculiar one. We were told that the board desired to obtain a decision on principle which would enable them to regulate their practice in the future. They therefore accepted responsibility for Haslam's act without going into any questions of vicarious liability; and they called no evidence in order, we were told, that the decision might be given on facts put against them as strongly as might be. What they wished to establish was that responsibility for overloaded lorries rested solely with the carrier and that the sale and delivery of the coal could not, if that was all that could be proved, involve them in a breach of the criminal law. For the reasons I have given I think that the law cannot be so stated and that the appeal should be dismissed.

SLADE J. (read by Lord Goddard C.J.). Before a person can be convicted of aiding and abetting the commission of an offence the prosecution must prove: (a) that he knew the essential matters which constituted the offence (*Johnson* v. *Youden*,[20] *Ferguson* v. *Weaving*[21]) and (b) that with such knowledge he assisted, or at least encouraged, the principal offender to commit the offence.

Mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed: for example, the owner of a car sitting alongside his chauffeur when the latter commits an offence.

In my judgment the words " assist " and " encourage " necessarily import motive, i.e., purpose or object. It is not sufficient that the alleged abettor should be proved to have done some act, or to have made some omission, without which the principal offender could not have committed the offence; nor is it sufficient that such act or omission had the effect of facilitating the commission of the offence or that it in fact operated on the mind of the principal offender so as to decide him to commit it. The prosecution must prove that the act or omission upon which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

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[19] [1951] 2 K.B. 799; [1951] 2 T.L.R. 553; [1951] 2 All E.R. 237.

[20] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.

[21] [1951] 1 K.B. 814; [1951] 1 T.L.R. 465; [1951] 1 All E.R. 412.

The foregoing brings me to the facts found, the inferences drawn and the opinions expressed by the magistrates. Mr. Thompson, who appeared for the National Coal Board, invited the court to identify the board with their servant Haslam and, if the court thought Haslam had aided and abetted Mallender, the lorry driver (who was not the servant of the board) to commit the offence, to treat the board also as being answerable for Haslam's offence. As I have reached the conclusion that there was no evidence upon which the magistrates could find that Haslam had aided and abetted Mallender to commit the offence, I am prepared to deal with the appeal upon the basis of Mr. Thompson's invitation, though I should have felt doubtful of the court's jurisdiction to do so in a criminal charge had my opinion been otherwise.

I accept the opinion of the magistrates that the property in the coal taken from the hopper and loaded into the lorry did not pass from the board to their customer, the Central Electricity Authority, until Haslam issued the weighbridge ticket to Mallender. It is, I think, clear that Haslam knew the essential matters which constituted Mallender's proposed offence when, but not until, he had weighed the coal. I do not think, however, that Haslam knew that it was the issue of the weigh ticket which operated to pass the property in the coal and thus to complete the sale of the coal to the board's customer, and I regard this consideration as important in considering Haslam's motive in issuing the weigh ticket. It is highly improbable that Haslam was acquainted with the provisions of sections 17 and 18 of the Sale of Goods Act, 1893, for ascertaining the intention of the parties with regard to the passing of the property in the coal, or that he ever applied his mind to the question of the precise moment at which the property in the coal would thereby be deemed to have passed. I will, however, assume against Haslam that such knowledge must be imputed to him. I then ask myself what courses were open to Haslam when he learnt, for the first time (i.e., on seeing the scale register the tare of the vehicle and the weight of the coal as in excess of 20 tons) the essential matters of the offence which he knew that Mallender intended to commit. Two courses only were open to him: (1) to call upon Mallender to off-load the coal, or so much of it as was necessary to reduce the total weight to 20 tons; and to refuse to issue a weigh ticket; or (2) to leave the coal where it was, thereby completing the sale, whereupon he would have to issue the weigh ticket in order to avoid contravening the requirements of section 21 of the Weights and Measures Act, 1889. Haslam chose the second of these alternatives, and it is his adoption of this choice which has been held by the magistrates to constitute the aiding and abetting of Mallender's offence.

If there were any evidence that Haslam's exercise of this choice was inspired by a desire to encourage Mallender to commit the offence (which Haslam knew Mallender intended to commit) I would agree with the magistrates' decision. Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words of encouragement to commit the offence.

Mr. Thompson referred us to *Reg.* v. *Coney*,[22] and particularly to the judgment of Hawkins J.[23] *Coney's* case was considered by the Court of Criminal Appeal in *Wilcox* v. *Jeffery*,[24] and both these cases seem to me to emphasize the importance of ascertaining the motive underlying an act or omission relied upon as constituting encouragement to another to commit an offence.

I do not think the magistrates applied their minds to the question whether Haslam issued the weigh ticket and thereby completed the sale for the purpose of, or with a view to, encouraging Mallender to commit the offence, or whether he did so with no such purpose in mind. Indeed, if I am wrong in my view that the words "encourage" and "assist" necessarily import "motive" there is no reason why they should have done so.

None of the facts found by the magistrates is, in my judgment, capable of supporting the inference that Haslam, in making the choice he did, issued the weigh ticket and thereby completed

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[22] 8 Q.B.D. 534.

[23] Ibid. 557.

[24] [1951] W.N. 77; [1951] 1 T.L.R. 706; [1951] 1 All E.R. 464.

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Slade J.

the sale with a view to encouraging Mallender to commit the offence which Mallender informed him he intended to commit. On the contrary, I think the facts so found tend to negative rather than to support any such inference, for example, the large notice displayed by the board on the door of the weighbridge ticket office and the facts found in paragraph 4 (k) and (l) of the case; nor can I see any reason why Haslam should desire to encourage the commission of the offence.

Moreover, if knowledge is not to be imputed to Haslam as to the precise moment when the property in the coal passed to the board's customer, I think Haslam was in a difficult position and may well have thought that he had no right to insist upon the off-loading of the excess coal, that Mallender might well have demurred to any such insistence, and that he, Haslam, could only have enforced his demand by taking the law into his own hands.

For these reasons I think that the question raised by the case should be answered in the negative, and that the conviction of the board should be quashed.

Appeal dismissed.

Solicitors: *Donald H. Haslam for Lawrence C. Jenkins, Nottingham; Kingsford, Dorman & Co. for D. G. Gilman, Derby.*

J. D. P.

1958
July 1, 2, 3, 11.

Ashworth J.

GREEN *v.* RUSSELL. McCARTHY (THIRD PARTY).

[X 1956 G. No. 97.]

Fatal Accidents Acts—Damages—Insurance—Payment to employer under personal accident group insurance policy—Employer "absolute owner" of policy—Employer's payment to deceased employee's dependant—Whether payment to be taken into account in assessing damages—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

By section 1 of the Fatal Accidents (Damages) Act, 1908: "In "assessing damages in any action . . . under the Fatal Accidents "Act, 1846 . . . there shall not be taken into account any sum "paid or payable on the death of the deceased under any contract "of assurance or insurance. . . ."

In 1951 an employer took out a personal accident group insurance policy which, after reciting "Whereas the insured is "desirous of securing payment of benefits as hereinafter set forth "to any insured person," provided that "if . . . any insured "person shall sustain bodily injury" resulting in death, the insurance company should pay a specified sum, and that "the "company shall be entitled to treat the insured as the absolute "owner of this policy and shall not be bound to recognize any "equitable or other claim to or in the policy and the receipt of "the insured . . . alone shall be an effectual discharge." The policy described the employer as the "insured" and named as the "insured persons" certain of his employees. Those employees knew of the existence of the policy but it formed no part of the terms of their employment nor did the employer undertake any obligation to maintain or renew the policy. In 1955 one of the employees named as an "insured person" died in a fire which occurred on the employer's premises. The employee's mother brought an action under the Fatal Accidents Acts in which liability was admitted and damages were agreed at £1,300. On the question whether a sum of £1,000 paid under the policy by the insurance company in respect of the death to the employer's solicitors and paid or about to be paid by them to the employee's mother was a benefit arising out of the death which should be taken into account and deducted from the agreed damages:—

Held, that the expression "paid or payable on the death of "the deceased under any contract of . . . insurance" in section 1 of the Fatal Accidents (Damages) Act, 1908, was descriptive of the sum itself and did not involve by implication the corollary that the sum must be paid or payable to the deceased under the contract of insurance; and that, therefore, the sum of £1,000 fell within the scope of section 1 and should not be subtracted from the agreed amount of damages.

Bowskill v. *Dawson* (*No. 2*) [1955] 1 Q.B. 13; [1954] 2 All E.R. 649 considered.

Held, further, that the language of the policy and the evidence was insufficient to justify an allegation that the employer was a trustee of sums payable under the policy.

Bowskill v. *Dawson* (*supra*) and *Prudential Staff Union* v. *Hall* [1947] K.B. 685; 63 T.L.R. 392 distinguished.

ACTION.

The plaintiff, Florence Green, a widow, suing on her own behalf and as the administratrix of the estate of her son, Alfred Edward Green, claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, in respect of the death of her son on June 6, 1955, in a fire which occurred in the premises where he was employed, against the defendant, Sarah Anne Russell, the administratrix of the estate of his employer, Arthur Henry Russell, who also died in the fire.

In 1951 the employer had taken out a Personal Accident Group Policy issued by the Yorkshire Insurance Company Ltd., which, after reciting that "Whereas the insured is desirous of "securing payment of benefits as hereinafter set forth to any "insured person in the event of his sustaining accidental bodily "injury as hereinafter provided . . . and has paid or agreed to "pay the premium as consideration for such insurance . . ." provided that "If at any time during the currency of this policy "any insured person shall sustain bodily injury . . . and such "injury shall . . . Section A.—Result in death the company "shall pay the sum insured stated in section A in the schedule." By condition 5 of the policy: "The company shall be entitled "to treat the insured as the absolute owner of this policy and "shall not be bound to recognize any equitable or other claim "to or interest in the policy and the receipt of the insured or "the insured's legal representative alone shall be an effectual "discharge." By condition 8: "The due observance and ful- "filment of the terms conditions and endorsements of the policy "in so far as they relate to anything done or complied with "by the insured or any insured person . . . shall be conditions "precedent to any liability of the company to make any pay- "ment under this policy." The schedule to the policy set out as "insured Arthur H. Russell," while under the heading "in- "sured persons" there were listed the names of certain of his employees, among them that of the plaintiff's son, and the sum set out opposite his name in section A was £1,000. The terms of employment of the plaintiff's son did not include any provision in regard to the policy and, although the existence of the policy was known to the employees named therein in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed, that did not affect their attitude to their employment so as to cause them, in consideration of those possible benefits, to refrain from giving notice or asking for an increase in salary, nor did the employer undertake an obligation to maintain or renew the policy. The insurance company duly paid £1,000 in respect of the death of the plaintiff's son to the defendant's solicitors, who paid, or were about to pay, that sum to the plaintiff.

The defendant admitted liability in the action and damages were agreed at £1,300, subject to the issue, which was the only issue before the court, of whether the £1,000 paid by the insurance company should be taken into account and deducted from the agreed figure of damages as representing a benefit arising out of the death of the plaintiff's son, or whether it was a sum "paid or payable" on the death of the son under "any contract of assurance or insurance" within the meaning of section 1 of the Fatal Accidents (Damages) Act, 1908,[1] and as such should not be taken into account.

Marven Everett Q.C. and *John Ritchie*, for the plaintiff, referred to *Davies* v. *Powell Duffryn Associated Collieries*[2] and *Bowskill* v. *Dawson (No. 2)*.[3] The £1,000 paid by the insurance company to the defendant's solicitors is within the scope of section 1 of the Fatal Accidents (Damages) Act, 1908, and therefore should not be subtracted from the damages payable to the plaintiff. The section does not require a plaintiff to show that there was any enforceable legal or equitable right in the deceased to claim the sum in question, but is phrased in the widest possible terms and refers to "any sum" payable under "any contract of assurance or insurance." Morris L.J. in *Bowskill* v. *Dawson (No. 2)*[4] said that it "appears, therefore, to "cover and include contracts of insurance other than those made "with the deceased." Had Parliament intended otherwise, it would have been easy to limit the scope of the section by adding words such as "by any form of assurance effected by the "deceased." It is, therefore, immaterial that under the policy the money was payable to the insurer; the £1,000 is "insurance "money" and is a sum "paid or payable on the death" of the plaintiff's son under a contract of insurance within the meaning of the section.

In *Bowskill* v. *Dawson (No. 2)*[5] the decision was based upon the enforceable right of the personal representatives as cestuis qui trust to receive payment; the point arising in this case was left open because there the money was payable to trustees who had a certain discretion as to its application so that it had lost its identity as insurance money. But this is a stronger case because here the money paid in respect of the death of the plaintiff's son, Green, remained labelled and identified as "Green" money throughout, and still retains its identity as money paid under the contract of insurance. The object of the policy was to ensure the payment of benefits to the persons named as "insured persons," and the fact that, as a matter of machinery, the money was made payable to the employer in the first place does not alter the nature of the scheme.

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[1] Fatal Accidents (Damages) Act, 1908, s. 1: "In assessing damages "in any action . . . under the Fatal "Accidents Act, 1846, as amended by "any subsequent enactment, there "shall not be taken into account any "sum paid or payable on the death "of the deceased under any contract "of assurance or insurance. . . ."

[2] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.

[3] [1955] 1 Q.B. 13; [1954] 2 All E.R. 649.

[4] [1955] 1 Q.B. 13, 23.

[5] [1955] 1 Q.B. 13.

Alternatively, it is submitted that the plaintiff can show that her son had a right enforceable in equity to receive payment of benefits under the policy, and the case falls within the decision in *Bowskill* v. *Dawson* (*No. 2*).[6] It is true that there is here no trust scheme as there was in that case, but a trust may be created by any language that shows an intention to create a trust: see the statement of the law set out in Halsbury's Laws of England, 2nd ed., vol. 33 (1939), p. 95, and *In re Williams* [7] there cited. The insurance policy, on its construction, amounts to a declaration of trust, for its language, particularly that of the recital, indicates the desire of the employer to impose upon himself an obligation enforceable in equity and to constitute himself a trustee for his employees named therein. That it created a trust is further shown by the facts that the employer made regular payment of the premiums due under the policy and that the sum paid on the death of the plaintiff's son was not treated as part of the employer's estate but was paid to the plaintiff. Had the employer lived and refused to make a claim under the policy in respect of the death of the plaintiff's son, the plaintiff could have brought proceedings against him to enforce the trust, and in this respect reliance is placed upon the observations of Romer L.J. in *Bowskill* v. *Dawson* (*No. 2*).[8] [Reference was also made to *Woods* v. *Woods*.[9]]

It is further submitted that at common law the plaintiff's son and his personal representatives, as beneficiaries under the contract of insurance, have rights against the employer which, if necessary, the courts will enforce. A contract by which one party agrees with another to pay money to a third party may, in certain events, be enforceable by the third party: see *Waters* v. *Monarch Fire and Life Assurance Co.*[10]; *Prudential Staff Union* v. *Hall* [11]; the judgments of Denning L.J. in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [12] and *Smith and Snipes Hall Farm*

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[6] [1955] 1 Q.B. 13.

[7] [1897] 2 Ch. 12.

[8] [1955] 1 Q.B. 13, 28.

[9] (1836) 1 My. & C. 401.

[10] (1856) 5 E. & B. 870.

[11] [1947] K.B. 685; 63 T.L.R. 392.

[12] [1954] 1 Q.B. 250, 269; [1953] 2 All E.R. 1475.

Ltd. v. *River Douglas Catchment Board*,[13] and also *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[14] [Reference was also made to *In re Schebsman.*[15]]

M. Dunbar Van Oss for the defendant. Section 1 of the Fatal Accidents (Damages) Act, 1908, creates a statutory exception to the general rule that credit must be given for all benefits arising from the death, and it is for the plaintiff to show that she comes within the exception: *O'Neill* v. *S. J. Smith & Co. (Bidford) Ltd.*[16] and *Smith* v. *British European Airways Corporation.*[17] But to come within the section the plaintiff must show that there was some legal or equitable right in her son or his personal representatives to receive payment of the benefits under the policy; a mere expectancy of receiving benefit as there was here is not sufficient: see *Bowskill* v. *Dawson* (*No. 2*),[18] where the court was at pains to satisfy itself that there was a right. Where there is no trust or legal obligation on the assured, but payment of a benefit to a third person is made as an act of discretion or because of a moral obligation, the payment is not a payment under the contract of insurance within the meaning of section 1 of the Act. Morris L.J. said in *Bowskill* v. *Dawson* (*No. 2*) [19] that there the insurance company were "under obligation to pay to the trustees who, in turn, were under obligation to pay to the personal representatives" so that the sum received could be labelled and identified and described as a sum paid under a contract of insurance and the deceased could be considered to have been a beneficiary under a trust and the chain of payment was uninterrupted. In this case, although the recital to the policy shows that it was the intention of the employer to "secure" the payment of benefits to the named employees, the taking out of the policy and payment of the premiums may well have been no more than an act of benevolence on his part to make sure that he would have sufficient money to fulfil his moral obligations to his employees, so that the payment to the plaintiff was no more than a voluntary act of benevolence. Further, the recital to the policy must be read with condition 5, which expressly states that no persons other than the employer are given any rights under the policy.

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[13] [1949] 2 K.B. 500, 513; sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179.

[14] [1954] 2 Q.B. 402, 421, 422; [1954] 2 All E.R. 158.

[15] [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768.

[16] [1957] 1 W.L.R. 1204; [1957] 3 All E.R. 255.

[17] [1951] 2 K.B. 893; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737.

[18] [1955] 1 Q.B. 13.

[19] Ibid. 23.

If, therefore, there was no legal or equitable obligation to pay the money received from the insurance company over to the plaintiff, the chain of payment was interrupted by a voluntary act of benevolence and the money can no longer be identified as "insurance" money, but, on the payment by the company to the employer, the "effect and force of that contract was thereupon exhausted," and the fact that the sum received by the plaintiff originated from the contract of insurance effected by the employer was "merely a fortuitous and irrelevant consideration": see the contention envisaged by Romer L.J. in *Bowskill* v. *Dawson (No. 2)*.[20]

Section 1 of the Act must be construed according to the ordinary meaning of the language used, and the expression "Any sum paid or payable . . . under any contract of . . . insurance" does not contemplate the intervention of a voluntary act, however closely it may be connected with the contract of insurance, between the payment by the insurance company and the payment to the plaintiff. "Under" in that context means "pursuant to" or "by virtue of" a contract of insurance, and involves some element of compulsion in connexion with the contract. Although there may well be cases where money which is payable to a third person under the contract of insurance—for example, where on payment to the assured the money is in some way vested in the third person so that he has an enforceable claim to payment—is within section 1, where a voluntary act intervenes the section has no application. Nor should the construction of the Act be stretched in order to achieve a desirable result. A reasonable expectation of benefit, as there was here, gives rise to no right. [Reference was also made to *Peacock* v. *Amusement Equipment Co. Ltd.*[21] and *Baker* v. *Dalgleish Steam Shipping Co.*[22]]

The plaintiff has not shown any equitable right to claim payment of the money, and *Bowskill* v. *Dawson (No. 2)* [23] should be distinguished in this respect. That was a special case where there were clear indications of a trust. In this case there is nothing resembling the trust scheme in *Bowskill* v. *Dawson (No. 2)* [23] and there is no evidence of a trust. Nor should one be gathered from the language used in the policy and recital, for clear and definite words are required to establish a trust. In

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[20] [1955] 1 Q.B. 13, 26.

[21] [1954] 2 Q.B. 347; [1954] 2 All E.R. 689.

[22] [1922] 1 K.B. 361; 38 T.L.R. 245.

[23] [1955] 1 Q.B. 13.

In re Schebsman[24] it was held that a contract to pay money to a third party did not constitute a trust, and reliance is placed on the observations of du Parcq L.J.[25]: "unless an intention to "create a trust is clearly to be collected from the language used "and the circumstances of the case, I think that the court ought "not to be astute to discover indications of such an intention"; see also *Hill* v. *Hill*,[26] in particular the judgment of Chitty L.J.[27] A good intention does not itself create a trust, nor does a moral obligation.

The persons named in the policy have no right at common law to claim payment of benefits under it, for the common law rule is still that only those persons who are privy to a contract may sue under it: see *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[28] *Waters* v. *Monarch Fire and Life Assurance Co.*[29] does not advance the plaintiff's case. In *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*,[30] which arose under the law of landlord and tenant, Denning L.J.[31] was concerned to place a wide interpretation on section 56 of the Law of Property Act, 1925, rather than to state a common law rule. *Prudential Staff Union* v. *Hall*[32] and *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*[33] should be distinguished, as should *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*,[34] a commercial case where there was a finding that it was intended that the third parties should be privy to the contract. [Reference was also made to *Tweddle* v. *Atkinson*[35] and *In re Schebsman*.[36]]

[ASHWORTH J. referred to the discussion of *Tweddle* v. *Atkinson*[37] in Chitty on Contracts, 21st ed. (1955), pp. 62, 64, and to Anson on Contracts, 19th ed. (1945), p. 257, and *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*.[38]]

John Ritchie in reply. In the circumstances of the case there is an implied trust which arose on the death of the plaintiff's son and the payment of the money by the insurance company, when the defendant became trustee for the plaintiff. Reliance is placed on *Woods* v. *Woods*,[39] and the general rule set out in

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[24] [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768.

[25] [1944] Ch. 83, 104.

[26] [1897] 1 Q.B. 483; 13 T.L.R. 227.

[27] [1897] 1 Q.B. 483, 493.

[28] [1915] A.C. 847; 31 T.L.R. 399.

[29] 5 E. & B. 870.

[30] [1954] 1 Q.B. 250.

[31] Ibid. 269.

[32] [1947] K.B. 685.

[33] [1949] 2 K.B. 500.

[34] [1954] 2 Q.B. 402.

[35] (1861) 1 B. & S. 393.

[36] [1944] Ch. 83.

[37] 1 B. & S. 393.

[38] [1933] A.C. 70, 79; 49 T.L.R. 90.

[39] 1 My. & C. 401.

Lewin on Trusts, 15th ed. (1950), p. 80, in regard to implied trusts is adopted. The plaintiff may have had no right against the insurance company, but the question is whether she has a right against the defendant or could have forced the employer to claim against the insurance company. For a distinction between a third party's rights at common law and in equity, see *Tomlinson* v. *Gill*.[40] The money is insurance money paid under a contract of insurance. The defendant would not have been entitled to put it into her own pocket, and her only right was to hold it in pursuance of the declared and manifest intentions set out in the policy; it is, therefore, money payable to the plaintiff under a contract of insurance and is within section 1 of the Act of 1908.

ASHWORTH J. I shall reserve my judgment because, and only because, counsel in the next case have been waiting for some time.

July 11. ASHWORTH J. read the following judgment. This action arises out of the death, on June 6, 1955, of Alfred Edward Green, the plaintiff, Florence Green, being his mother. The defendant is the widow of Arthur Henry Russell, who died on the same day and who was Green's employer. The cause of death was a disastrous fire which occurred in the premises where both men worked, but as liability is admitted, it is unnecessary to consider further the circumstances surrounding the tragedy. Nor do I need to do more than mention the fact that third party proceedings were taken, since those proceedings were settled out of court.

Subject to the issue which has been argued before me, the damages to be awarded to the plaintiff were agreed at a figure of £1,300. That issue raises the question whether a sum of £1,000, which has been or is about to be paid to the plaintiff, should be deducted from the agreed figure on the ground that it represents a benefit arising out of the death of Green which must be set off against the loss which the plaintiff sustained by reason of his death. For the plaintiff it is contended that the sum of £1,000 should not be deducted, in that it falls directly within the provisions of section 1 of the Fatal Accidents (Damages) Act, 1908, as being a sum paid on the death of the deceased under a contract of insurance.

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[40] (1756) Amb. 330.

Russell was an architect employing a small number of men, of whom Green was one. In the year 1951 he decided to enter into a form of insurance in respect of some at least of his employees, and submitted to the Yorkshire Insurance Company Ltd. a proposal dated September 25, 1951. I do not think that anything turns on the wording of this proposal, but the policy which was issued as a result is of considerable importance. It is described as being a Personal Accident Group Policy and it starts with a recital in the following terms: "Whereas the "insured is desirous of securing payment of benefits as herein-"after set forth to any insured person in the event of his "sustaining accidental bodily injury as hereinafter provided. . . ." It is clear from the schedule on the back of the policy that "the insured" meant the employer, Russell, and that "insured "persons" were the persons whose names were listed in the schedule, namely, his employees. By some mischance Green's name did not appear in the original list, but it is accepted that he was at some time included in the list of insured persons, and indeed there is attached to the policy an indorsement by which his name was deleted with effect from his death in June, 1955.

Following the recital, the policy provided that if any insured person should sustain bodily injury resulting in death, the company would pay the sum insured stated against section A in the schedule, in this instance £1,000. It is to be noted that this provision does not in terms state to whom the payment is to be made, but the fifth condition makes the position clearer: "The company shall be entitled to treat the insured as the "absolute owner of this policy and shall not be bound to "recognize any equitable or other claim to or interest in the "policy, and the receipt of the insured or the insured's legal "representative alone shall be an effectual discharge." It is common ground between the parties that the Yorkshire Insurance Company have paid £1,000 in respect of Green's death to the defendant's solicitors and that they have paid over part of that sum to the plaintiff and are in process of paying over the balance.

The plaintiff's case before me was closed without any oral or documentary evidence being tendered for the purpose of showing that under the terms of their employment Russell's employees acquired any contractual rights against him in respect of the policy or indeed that they were aware of its existence. After Mr. Van Oss had begun his argument for the defendant application was made on behalf of the plaintiff to call two witnesses who were at the material time in Russell's employment. Not without some hesitation, and in spite of objection by Mr. Van Oss, I acceded to the application, and the witnesses Biggs and Warwick were accordingly called. As a result of their evidence it is, to my mind, plain that the terms of their employment did not include any provision in regard to the policy. There was nothing in those terms which resembled the provisions contained in the booklet issued by the employers in *Bowskill* v. *Dawson (No. 2)*.[1] On the other hand, I think that the existence of the policy was known to the employees in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed. I should perhaps add, in view of a point taken in the course of the argument in reply to Mr. Van Oss, that I can find nothing which would justify the inference that the possibility of benefit under the policy affected the employees' attitude in regard to their employment; there was nothing to show that they refrained from giving notice or from asking for an increase in salary in consideration of the benefit which might come to them from the policy, nor was there anything to show that Russell undertook an obligation to maintain or renew the policy.

The argument on behalf of the plaintiff may be summarized as follows. In the first place it was said that, in order to take advantage of what Lord Wright[2] called the relaxation afforded by the Act of 1908, a plaintiff is not called upon to establish that there was any enforceable right, legal or equitable, in the deceased or his personal representatives to claim the sum in question. All that has to be established is that the sum in question was a sum paid or payable on the death of the deceased under any contract of assurance or insurance. In the second place, and by way of alternative, it was said that on the facts of the present case the employer Russell constituted himself a trustee of sums payable under the policy and that an employee or his personal representative could enforce in equity performance of that trust. In the third place, it was said that inasmuch as the sums payable under the policy were in the light of the recital paid for the benefit of (inter alios) Green, he or his personal representatives had a right at common law to claim the sums even though he was not a party to the contract.

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[1] [1955] 1 Q.B. 13; [1954] 2 All E.R. 649.

[2] In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601, 612; 58 T.L.R. 240; [1942] 1 All E.R. 657.

The first of these submissions involves the problem which the Court of Appeal in *Bowskill* v. *Dawson* (*No. 2*)[3] expressly refrained from deciding. Romer L.J. said[4]: "If the employees "who were within the scheme had no rights under it at all, "but merely an expectation of benefit depending wholly on the "volition and goodwill of their employers, it could, I suppose, "be contended (and I express no concluded opinion upon the "validity of the contention) that such sums as their dependants "might receive were mere bonuses, and that the fact that they "originated from a policy effected by the employers was merely "a fortuitous and irrelevant consideration." If I may say so, that supposition was right, since the contention envisaged by him was one of the main points in Mr. Van Oss's argument for the defendant. The reason why the Court of Appeal were free in that case to reserve the problem for future consideration was the existence of a scheme under which employees obtained rights, enforceable in equity, to receive sums paid under a policy of insurance. For reasons which will appear later, no such way of escape is open to me.

The principle has for long been established that in assessing a claim under the Fatal Accidents Acts both the loss and the gain to the dependants arising from the death must be taken into account. If the gain arises by way of legal right, there is plenty of authority for saying that it must be taken into account, and I need only cite on this point two sentences from the judgment of Scrutton L.J. in *Baker* v. *Dalgleish Steam Shipping Co.*[5]: "On the other hand, as the question is what is "her pecuniary loss by the death, any pecuniary advantage she "has received from the death must be set off against her probable "loss. This is clear if she receives such advantage as of legal "right." If the gain arises by way of a right enforceable in equity, the decision in *Bowskill* v. *Dawson* (*No. 2*)[6] is authority for saying that it must be taken into account.

The third type of gain is gain to which neither the deceased nor his representatives have any claim enforceable in law or in equity, but in respect of which it may be said that there was a probability or reasonable expectation that it would be received. An example of this type is to be found in *Baker* v.

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[3] [1955] 1 Q.B. 13.

[4] Ibid. 26.

[5] [1922] 1 K.B. 361, 372; 38 T.L.R. 245.

[6] [1955] 1 Q.B. 13.

Dalgleish Steam Shipping Co.[7] and the Court of Appeal held that the gain, which took the form of a pension from the Crown, should be taken into account. A fourth type of gain is such as arises purely and simply from the generosity or goodwill of the donor, there being no reason at the date of the death to expect it to arise. Such a case was considered by the Court of Appeal in *Peacock* v. *Amusement Equipment Co. Ltd.*[8] in which it was held that such gain should not be taken into account.

Section 1 of the Act of 1908 is in the following terms: "In assessing damages in any action, whether commenced "before or after the passing of this Act, under the Fatal Acci"dents Act, 1846, as amended by any subsequent enactment, "there shall not be taken into account any sum paid or payable "on the death of the deceased under any contract of assurance "or insurance, whether made before or after the passing of this "Act." Until the Act was passed, money paid under a life policy on the life of the deceased would have to be taken into account, and it may be supposed that one at least of the objects of the Act was to relieve dependants of the hardship of having compensation reduced by reason of the deceased's own thrift. But the language of the section is wide and, as Romer L.J. said,[9] it leaves something to the imagination.

One of the points put forward on behalf of the defendant was that section 1 constitutes, so to speak, a statutory exception to the general rule that gains must be taken into account, and accordingly that the burden was on the plaintiff to bring herself within the ambit of the section. On this basis it was further said that the language of the section ought not to be strained or given a wider interpretation than it could properly bear, even if the result bore hardly on the plaintiff. Assuming that the foregoing is the correct approach, there is still, in my judgment, a major difficulty in the defendant's way, namely, the absence of any words of limitation in the section. As it seems to me, there is no need to strain the language in order to give effect to the plaintiff's claim; on the other hand, to give effect to the defendant's argument involves the notional inclusion in the section of words of limitation restricting the scope of the section to cases in which the deceased or his representatives had some enforceable right to the sum in question. It would not be enough, having regard to the decision in *Bowskill* v. *Dawson* (*No. 2*),[10] to imply a provision that the contract of assurance or insurance must have been made by the deceased or on his behalf: words would be required to cover policies entered into or held in trust for the deceased. No doubt apt words could be selected for this purpose, but the plain fact is that they are not in the section now.

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[7] [1922] 1 K.B. 361.

[8] [1954] 2 Q.B. 347; [1954] 2 All E.R. 689.

[9] [1955] 1 Q.B. 13, 24.

Emphasis was also laid on the fact that the section excludes a sum paid "under" a contract of insurance, and it was said that the sum of £1,000 paid to the plaintiff was not so paid, but was paid under a sense of moral obligation on the part of the defendant. In other words, to quote again from Romer L.J. in *Bowskill* v. *Dawson* (*No. 2*),[11] the effect and force of the contract of insurance was exhausted when the sum in question was paid by the Yorkshire Insurance Company to the defendant. Although I appreciate that the problem now under consideration was left undecided by the Court of Appeal, it seems to me that this particular argument, if sound, would have been upheld in that case. In my judgment, the expression "paid or payable on the death "of the deceased under any contract of . . . insurance" is descriptive of the sum itself and does not involve by implication the corollary that the sum was paid or payable to the deceased under the contract of insurance. Moreover, I think that force is lent to this view by the double use of the word "any": any sum, any contract of insurance.

It is perhaps worth mentioning that in cases where the sum in question originates in a contract of insurance, the dependants only require the assistance of the Act of 1908 if the resulting gain falls within the first three of the types of gain referred to above. If there was no probability or reasonable expectation that the sum would be received, the dependants would not be required to bring it into account. If, for example, an employer, anxious to guard against loss to himself by the accidental death of a skilled employee, takes out a policy of insurance but does not tell the employee or lead anyone to suppose that benefit may arise therefrom to the employee or his dependants, and then on the accidental death of the employee through the negligence of a third party decides, from motives of generosity, to pay the sum in question to the employee's widow, the third party could not contend that she should bring it into account in her claim against him. But she would primarily rely on the principle applied in

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[10] [1955] 1 Q.B. 13.

[11] Ibid. 26.

Peacock's case[12] rather than the Act of 1908 to protect herself from reduction in compensation.

It is conceded by the defendant that the first two types of gain referred to above are within the Act of 1908, and in my judgment it would have been a simple matter to include words limiting the scope of section 1 to those two types, if that was Parliament's intention. On the other hand, if the intention was to include the first three types, there is no necessity to add to the language actually used.

For these reasons I hold that the sum of £1,000, which the plaintiff either has received or is about to receive, is within the scope of section 1 of the Act of 1908 and should not be subtracted from the agreed figure of £1,300.

In these circumstances it is tempting to follow the example set in *Bowskill* v. *Dawson* (*No. 2*),[13] and express no view on the two other contentions relied on by the plaintiff. But as the case is of some importance and counsel pressed me to deal with these other contentions, I propose to do so in regard to one of them.

It was contended that in the present case, as in *Bowskill* v. *Dawson* (*No. 2*),[13] Green or his personal representatives had a right in equity to claim payment of the benefits set out in the schedule to the policy if an event occurred which rendered them payable. It was not, and in my view could not be, contended that there was anything in the present case which could fairly be regarded as comparable with the deed and the booklet which were the basis of the decision in *Bowskill* v. *Dawson* (*No. 2*).[13] But it was said that the employer, Russell, did impose upon himself an obligation enforceable in equity and constituted himself a trustee for employees included in the list of insured persons. Reliance was placed upon the wording of the recital, the payment of the premiums year by year and the recognition by his widow (the defendant) and her solicitors of an obligation to pay over to the plaintiff the sum received from the Yorkshire Insurance Company by reason of Green's death, evidenced by a letter dated June 16, 1955, from the defendant's solicitors to the plaintiff's solicitors.

The wording of the recital is: "Whereas the insured is "desirous of securing payment of benefits as hereinafter set "forth to any insured person . . . ," and it is contended that on its true construction this language amounts to a declaration of trust on the part of Russell, the insured, in favour of the insured persons respectively of such payments as might be made under the policy. Apart from this recital, there is in my judgment no evidence whatever that Russell himself intended to constitute himself a trustee of such payments. In *In re Schebsman* [14] Lord Greene M.R. said [15]: "An examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character, but in the present case I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third." And in the same case, du Parcq L.J. said [16]: "It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention." There is also a passage to the same effect (which I mention but do not set out) in the judgment of Lord Wright in the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York.*[17]

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[12] [1954] 2 Q.B. 347.

[13] [1955] 1 Q.B. 13.

Although the point is not conclusive, it is to be noted that the recital is part of a printed form and the language is that of the insurance company rather than that of the employer, Russell, or his legal advisers. Moreover, the language is at least consistent with a desire on his part to secure, that is, make sure, that there was money available to meet claims against him by any of his employees included in the list of insured persons, in the event of his own finances being insufficient.

As was pointed out by Mr. Van Oss, a good intention does not of itself create a trust, and even if it were right to infer that if Russell had survived he would not have wished to retain for himself the sum of £1,000 received in respect of Green's death, it is none the less true that a moral obligation is no basis for asserting an enforceable trust.

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[14] [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768.

[15] [1944] Ch. 83, 89.

[16] Ibid. 104.

[17] [1933] A.C. 70, 78–80; 49 T.L.R. 90.

Reference was made to a number of reported cases, but apart from *Bowskill* v. *Dawson (No. 2)* [18] and *Prudential Staff Union* v. *Hall* [19] there was no close parallel to the present case, so far as this issue is concerned, and for that reason I refrain from citing them. In both the cases just mentioned there was ample material to justify the allegation of a trust. In my judgment, the plaintiff has failed to discharge the burden of satisfying me that a trust was created, and if the claim had depended on her doing so, it would have failed.

The third ground on which the claim was put forward involved the contention that at common law, although Green was not a party to the contract of insurance, he would have been entitled to claim under it, and accordingly his mother, the plaintiff, is equally so entitled. Support for this contention is to be found in the judgments of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [20] and in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [21] and possibly in the judgment of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[22] Since this contention raises an issue upon which legal opinion is divided and no decision regarding it is required in the present case, I prefer to take refuge in silence. The point is open to the plaintiff, in the event of an appeal.

The result is that there must be judgment for the plaintiff for the agreed sum of £1,300.

Judgment accordingly.

Solicitors: *Abbott, Baldwin & Co.; Greenwoods.*

J. F. L.

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[18] [1955] 1 Q.B. 13.

[19] [1947] K.B. 685; 63 T.L.R. 392.

[20] [1949] 2 K.B. 500, 513; (sub nom. *Smith* v. *River Douglas Catchment Board*), 65 T.L.R. 628; [1949] 2 All E.R. 179.

[21] [1954] 1 Q.B. 250, 269; [1953] 2 All E.R. 1475.

[22] [1954] 2 Q.B. 402, 421, 422; [1954] 2 All E.R. 158.

HARGREAVES *v.* BRETHERTON AND ANOTHER.

1958
July 23.

Lord Goddard C.J.

[1956 H. No. 509.]

Perjured Evidence—Whether a tort—Criminal proceedings—Allegation of perjury in criminal proceedings—Whether action for damages will lie at suit of person alleging damnification by false evidence.

An action for damages will not lie at the suit of a person who alleges that he has been damnified by false evidence given against him in criminal proceedings.

Revis v. *Smith* (1856) 18 C.B. 126, *Henderson* v. *Broomhead* (1859) 4 H. & N. 569, and dictum of Lord Halsbury L.C. in *Watson* v. *M'Ewan* [1905] A.C. 480, 486 applied.

PRELIMINARY POINT OF LAW.

In March, 1955, the plaintiff was indicted at Gloucester Assizes and (according to paragraph 22 of his statement of claim) was found guilty on 16 out of 17 counts under section 12 (1) (*a*) (i) of the Prevention of Fraud (Investments) Act, 1939, and sentenced to eight years' preventive detention on each count to run concurrently, which sentence he was still serving. An application for leave to appeal against conviction was dismissed by the Court of Criminal Appeal. In February, 1956, the plaintiff brought an action claiming damages against the defendants jointly and severally in which one of the heads of claim alleged was that the first defendant, called as a witness for the prosecution, gave false evidence at his trial; by paragraph 21 of the statement of claim he alleged that "in the course of the said trial the first named "defendant falsely and maliciously and without just occasion "or excuse committed perjury in relation to the facts of the "case," and after setting out particulars, that "it was a reasonable and probable consequence of the aforesaid perjury that "there would be a conflict of evidence between the plaintiff and "the first named defendant and that in consequence thereof the "plaintiff would be convicted."

By paragraph 16 of the defence the defendants, after denying that the first defendant had committed perjury in the course of the plaintiff's trial, contended that, "assuming the first defendant "committed perjury or spoke falsely, maliciously or without just "occasion or excuse in relation to the facts of the plaintiff's trial "or uttered false statements concerning the plaintiff in the course "of the plaintiff's said trial, then such acts or omissions on the "part of the first defendant do not give to the plaintiff any cause "of action against the defendants, alternatively that perjury "or other false statement made by a witness in the course of "criminal proceedings does not constitute a tort nor any other "wrong giving rise to a civil remedy in damages at the suit of "him who has been convicted or who has suffered damage by or "because of such perjury or false statement."

On June 18, 1958, Master Diamond ordered that the contentions raised by the defendants in paragraph 16 of the defence be argued as preliminary points of law under R.S.C., Ord. 25, r. 2.

Martin Jukes Q.C., *Bernard Caulfield* and *Roy McAulay* for the defendants. The authorities from 1596 down to modern times show that this action in so far as it is based on perjury will not lie. Roscoe's Evidence in Civil Actions, 20th ed. (1934), vol. 2, p. 843, states: "Perjury causing damage to the "plaintiff gives no ground of action, whether it be committed "by a witness; *Damport* v. *Sympson*,[1] or a deponent in an "affidavit; *Eyres* v. *Sedgewicke*.[2]" In *Damport* v. *Sympson*[3] the majority of the court were of opinion that[4] "this action "lies not; for at the common law there was not any course "in law to punish perjury," and that[4] "if he should be "punished in law by this action, there would be some precedent "of it before this time," although Anderson C.J. "conceived "the action was maintainable." As long ago as 1596, therefore, it was said that the fact that there was no precedent was a good argument that the action would not lie. In 1620, in *Eyres* v. *Sedgewicke*,[5] it was held that an action on the case would not lie for making a false affidavit; Montague C.J., Doderidge and Chamberlain JJ.[6] put the matter on the ground of public policy and convenience, "for, for misdemeanor in courts, "every court (where the abuse is committed) shall have the "examination thereof, and if they find misdemeanor, may "punish it; but to punish it by an action upon the case, upon "pretence of a false oath, shall not be suffered"; and Doderidge J. said[6] that there would be "oath against oath; and the law "cannot know which of them is true, but shall presume the one "to be as well true as the other: wherefore the law will not "suffer such an inconvenience, but it ought to be punished by "conviction upon indictment or suit in the Star-chamber"; Houghton J.[7] held the contrary, but only, it seems, because the defendant had not "come in by process of law as a witness" and was not punishable, if his affidavit were false, upon the statute of 5 Eliz. 1, c. 9, or by indictment. In *Rex* v. *Skinner* [8] Lord Mansfield said [9] that, apart from punishment by the court, "neither party, witness, counsel, jury, or judge, can be put to "answer, civilly or criminally, for words spoken in office," and it is submitted that the evidence of a witness at a criminal trial comes within those words.

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[1] (1596) Cro.Eliz. 520.
[2] (1620) Cro.Jac. 601.
[3] Cro.Eliz. 520.
[4] Ibid. 521.
[5] Cro.Jac. 601.
[6] Ibid.
[7] Ibid. 602.

Reliance is also placed on the nineteenth-century cases of *Revis* v. *Smith* [10] and *Henderson* v. *Broomhead*,[11] where again emphasis was placed on convenience and public policy, and the mischief which would result if witnesses could not speak freely. If this action lay, it would be "oath for oath" and the court would, in effect, be trying the first defendant for perjury; see, in particular, the judgment of Jervis C.J. in *Revis* v. *Smith*.[12] [Reference was also made to *Munster* v. *Lamb*.[13]] For a more recent case, see *Watson* v. *M'Ewan*,[14] where Lord Halsbury L.C. said [15] that it was now too late to argue as if the immunity of a witness for evidence given in a court of justice was doubtful; that it was settled law and, in view of the necessity for immunity, too plain for argument.

There is no case in which damages have been obtained for false evidence in legal proceedings; all attempts to bring such an action have failed, and on the authorities and on the grounds of public policy and convenience it is submitted that this case is too plain for argument, and that paragraphs 21 and 22 of the statement of claim should be struck out as disclosing no cause of action.

Ashe Lincoln Q.C. and *L. A. de Pinna* for the plaintiff. Perjury is an invasion of a private right, and is a tort as well as an offence against the Crown. Prima facie, therefore, an injured person has a right of action.

[LORD GODDARD C.J. How can such an action be brought when there has been no conviction for perjury? It would mean that the judge would have to try what was, in effect, a charge of perjury. And how could it be proved that the perjury resulted in the conviction? The plaintiff's conviction has not been set aside.]

The onus of proof of perjury would be on the plaintiff and it might be that, as in a criminal trial, the evidence of two witnesses would be required. It would also be for the plaintiff to establish the damage flowing from the perjury. The fact that the plaintiff's conviction has not been set aside merely goes to quantum of damage, but he has a right to have his cause of action tried.

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[8] (1772) Lofft 55.
[9] Ibid. 56.
[10] (1856) 18 C.B. 126.
[11] (1859) 4 H. & N. 569.
[12] 18 C.B. 126, 140.
[13] (1883) 11 Q.B.D. 588.
[14] [1905] A.C. 480.
[15] Ibid. 486.

Support for the proposition that perjury does give a right of action at common law is to be found in Coke's Institutes, Part III, Chapter 74, where it is said, at p. 164: "but a milder punishment "is set down by the Statute of 23 Hen. 8. wherein the party "grieved hath election to ground his writ of attaint upon this "statute, or to take his remedy at common law. For perjury "concerning any temporall act, the ecclesiastical court hath no "jurisdiction; and if it be concerning a spiritual matter, the party "grieved may sue for the same in the Star-chamber." That would seem to indicate that an action might be brought in the Star Chamber by way of a civil remedy for perjury; Coke cites two cases, that of *Rowland Ap Eliza*,[16] where it was resolved that perjury in a witness was punishable by the common law, and *Onslowe's Case*,[17] in which it was held that actions for perjury could not be tried in the Star Chamber and refers to the latter as wrongly decided. In Bacon's Abridgement of the Law, Vol. 6, Tit. Perjury (A), it is stated: "8thly, It does not seem material, "whether the false oath were credited or not, or whether the "party in whose prejudice it was taken were in the event any "ways damaged by it; for the prosecution is not grounded on "the damage to the party, but on the abuse of public justice" and, note (*c*), "But a party injured by the perjury of a witness "may proceed against him by action on the case for damages. "*Per* Lord Ellenborough" in *Amey* v. *Long*.[18] In *Amey* v. *Long*[18] the plaintiff brought an action on the case against a defendant against whom a subpoena duces tecum had been sued out and who had appeared as a witness and sworn that he had not got and knew nothing of the document in question; objection was taken[19] that the only remedy against the defendant was an indictment for perjury, and Lord Ellenborough observed that[19] "If a man commits a misdemeanour, the person who is injured "by the offence, is not in every case to be driven to proceed "against him criminally, but may maintain a civil action for "damages." That observation also lends colour to the suggestion that an action for damages would lie collaterally with a prosecution. Further, Doderidge J. in *Eyres* v. *Sedgewicke*[20] said that perjury ought to be punished upon indictment or suit in

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[16] 3 Co.Inst. 164.

[17] 2 Dyer 242b.

[18] (1807) 1 Camp. 14.

[19] Ibid. 16.

[20] Cro.Jac. 601, 602.

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the Star Chamber, that is, that the right of action in the Star Chamber ought to be preserved; his reference to *Skelhorn* v. *Harrison*,[21] however, must have been from memory, because in fact in that case, an action for putting in false bail, judgment was given for the plaintiff. It was there argued that although deceits to courts should be punished by imprisonment, that did not mean that an action upon the case would not lie, and Gawdy J. and Popham C.J.[22] held that the "action well lay for "this falsity." Reliance is also placed on the opinion of Anderson C.J. in *Damport* v. *Sympson*.[23] Although he was there overruled, it does not appear that an action for perjury was regarded with any abhorrence, and both he and Lord Ellenborough [24] appeared to think that such an action would lie; Houghton J. expressed the same view in *Eyres* v. *Sedgewicke* [25] when he said that "the action is well maintainable, for he is "damnified by that false oath."

When *Damport* v. *Sympson* [26] and *Eyres* v. *Sedgewicke* [27] were decided the statute 5 Eliz. 1, c. 9, was in force. That statute (which is referred to in Coke's Institutes, Part III, Chapter 74, pp. 163, 164, as affirming and strengthening the common law right to sue for damages) imposed a punishment for perjury and provided that any injured person could sue for half the penalty, and that fact may well have influenced the decisions: see the argument in *Damport* v. *Sympson* [28] that if the action should be allowed, the defendant might be twice punished. But the Perjury Act, 1911 (see section 17 and the Schedule), repealed the statute 5 Eliz. 1, c. 9, and it is submitted that those two cases are no longer in point. So also is the proposition stated by Lord Halsbury L.C. in *Watson* v. *M'Ewan* [29] not in point, for the words "the remedy against a witness who has given evidence "which is false and injurious is to indict him for perjury" show that it was based on the fact that a private prosecution would lie.

[LORD GODDARD C.J. But many things could be done in the Star Chamber which could not be done at common law.]

The statute which abolished the Star Chamber [16 Car. 1, c. 10] provided that all the remedies pursued in it might be pursued at common law. It is submitted that the civil remedy

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[21] (1600) Cro.Eliz. 714.
[22] Ibid.
[23] Cro.Eliz. 520, 521.
[24] 1 Camp. 14, 16.
[25] Cro.Jac. 601, 602.
[26] Cro.Eliz. 520.
[27] Cro.Jac. 601.
[28] Cro.Eliz. 520, 521.
[29] [1905] A.C. 480, 486.

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has remained and that if wilful perjury leads to damage which can be proved, there is a right to recover.

Revis v. *Smith* [30] and *Henderson* v. *Broomhead* [31] were both cases of defamation and should be distinguished. Defamation may well be accidental, and it was for that reason that it was held that absolute privilege applied, but the absolute privilege applicable to defamation has no relevance to the question whether or not there is a remedy for perjury, and the fact that a witness may not be sued for defamation does not mean that he cannot be sued for perjury. *Watson* v. *M'Ewan* [32] was also a case of defamation; the issue there was whether the privilege which protects a witness in respect of his evidence in the witness-box from an action for slander also protected him against the consequence of statements made to the client and solicitor in preparing the proof for trial, and it is submitted that the general statement by Lord Halsbury L.C.,[33] on which the defendants rely, was obiter. No court has ever gone so far as to say that absolute privilege applies to a case of perjury.

It is no answer to this claim to say that there is no case in which damages have been recovered for false evidence in legal proceedings; there are many instances of novel claims in the history of the law, for example, the first claim for damages for loss of expectation of life, and the fact that there have been no recent cases does not mean that there is no right of action. The only argument adduced for the defendants is based on public policy, but it is a matter of public policy that perjury should not be committed. There is no difference between perjury and the many cases of felony and misdemeanor in which there is a concurrent right to have the defendant prosecuted and to recover damages. If perjury has been committed, therefore, there is no reason why the person suffering damage should not be able to recover. The fact that there has been no prosecution for perjury is not a bar to a plaintiff's suit if a reasonable excuse is shown: *Smith* v. *Selwyn*,[34] and it is submitted that it is a reasonable excuse that the plaintiff is serving a prison sentence. Nor is a statement of claim demurrable on the ground that it shows the cause of action to be a felony for which the felon has not been prosecuted: *Roope* v. *D'Avigdor*.[35]

Jukes Q.C. was not called upon to reply.

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[30] 18 C.B. 126.

[31] 4 H. & N. 569.

[32] [1905] A.C. 480.

[33] Ibid. 486.

[34] [1914] 3 K.B. 98.

[35] (1883) 10 Q.B.D. 412.

LORD GODDARD C.J. stated the facts and contentions set out above and continued: The simple point that I have to decide is whether or not an action lies at the suit of the person who says that he has been damnified by false evidence given against him. In my opinion it is perfectly clear and beyond peradventure nowadays that such an action will not lie. The matter has been adumbrated and considered since the thirty-eighth and thirty-ninth year of the reign of Queen Elizabeth I. It was raised again in the eighteenth year of the reign of James I. It is true that in Part III, Chapter 74, p. 164 of Coke's Institutes, there is a passage by that most learned writer which gives rise to an argument that such an action would lie, but the two cases, *Damport* v. *Sympson*[1] and *Eyres* v. *Sedgewicke*,[2] heard in the reigns of Queen Elizabeth I and James I decided that it would not. I do not propose to deal with those cases at any length because there is to be found modern authority to the effect that such an action will not lie, and nobody has been able to point to any case in the whole history of our law in which such an action has been entertained by the courts.

In *Rex* v. *Skinner*[3] an indictment was preferred for scandalous words spoken of a jury by one of His Majesty's justices of the peace, and on a motion to quash the indictment Lord Mansfield said[4]: "I am willing, as neither Serjeant Davy, nor Mr. Buller, "find any precedent in the history of England, for an indictment "of this kind, to give them time till next term to find any. "What Mr. Lucas has said is very just; neither party, witness, "counsel, jury, or judge, can be put to answer, civilly or "criminally, for words spoken in office." That is a perfectly clear statement by one of the greatest common lawyers that ever lived, that for words spoken by a witness "in office," which means, of course, for this purpose in giving evidence, he cannot be put to answer either civilly or criminally.

The matter has been dealt with even more concisely and clearly in a series of cases beginning with *Revis* v. *Smith*[5] in which Jervis C.J., giving the first judgment, said[6]: "I am of "opinion that this action will not lie. Mr. Brown admits that "the proceeding is somewhat novel. It is in truth entirely so, "and, as I think, totally without principle or analogy to sustain "it. So far as appears from the declaration, it is quite consistent "that the defendant believed what he stated to be true; and we

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[1] (1596) Cro.Eliz. 520.
[2] (1620) Cro.Jac. 601.
[3] (1772) Lofft 55.
[4] Ibid. 56.
[5] (1856) 18 C.B. 126.
[6] Ibid. 140.

"are called upon to punish him in a civil action for a statement "made by him in the course of a judicial proceeding, which statement he believed himself to be justified in making, and had an "interest in making. But, take the converse case"—that is to say, where he did not believe the statement—"Mr. Brown says "that the moment a witness swerves from the truth, an action lies "against him at the suit of the party injured. What would be "the consequence of that? Why, that you would be trying him "for perjury; and, by the testimony of one witness in a civil suit, "you would be convicting a man of a crime of which he could "not be convicted in a court of criminal jurisdiction without the "concurring testimony of two. By the general policy of the law, "a witness is privileged: and I see nothing to take this case out "of the general rule." Cresswell J. said [7]: "I entirely agree with "my Lord. It is enough to say that the world has gone on very "well without such actions as these; and I doubt whether it "would continue to do so if such things were allowed. It would "be highly inconvenient to hold a man liable where he gives "evidence which is relevant to the cause. It is admitted that this "action is without precedent. It certainly is not within any "principle that I am aware of; and I am not disposed to introduce it." Crowder J. gave judgment to the same effect, and so did Willes J. Jervis C.J. there pointed out what occurred to me directly I read this pleading and understood what the point was that I had to try; namely, that it would be most unfortunate if an action for damages for alleged perjury could be brought not only when nobody had been convicted of perjury, but, quite apart from that, merely on the allegations of a person who says that somebody has committed perjury, which led to him being damnified either by being convicted or put on trial. For if such an action could be brought, then, in these days, when the State provides legal aid, half the prisoners in England would try to bring actions and there would be an abundance of these actions in the courts, which would be a most unfortunate result. It has to be remembered that sometimes people are brought to give evidence by subpoena, and that they can be compelled to give evidence. That, of course, does not excuse them for committing perjury, but the penalty for committing perjury is not that they should be asked to pay damages, but that they should be sentenced for the crime which has been committed—and sentenced by a criminal court.

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[7] 18 C.B. 126, 141.

In 1859, in *Henderson* v. *Broomhead*[8] it was sought to bring an action against a person who, in the course of a cause, made an affidavit in support of a summons taken out in the cause which was scandalous, false and malicious, though the person scandalized and who complained was not a party to the cause. It was held that no such action lay, and Erle J. said[9]: "The question "is, whether an action will lie against a party who in the course "of a cause made an affidavit which contained matter scandalous "to the present plaintiff, and which was false and malicious." Then he said[10]: "The question then is, whether, instead of "prosecuting the person who made the affidavit, for perjury, the "party aggrieved has a right to bring a civil action. An action "will not lie for defamatory words spoken in the course of litiga-"tion which are relevant to that litigation. The authorities are "collected in the note to *Lake* v. *King*,[11] 1 Wms.Saund. 131b, "note 1, and the general rule is there stated: 'No false or "'scandalous matter contained in articles of the peace exhibited "'to justices of the peace, or in any other proceeding in a "'regular course of justice, will make it libellous.'" Later on in his judgment he said[12]: "The party may be punished, and "the abuse repressed by a prosecution for perjury, the result "of which is to make the defendant infamous if he is convicted. "It is said that the civil remedy should be allowed for the "purpose of indemnifying the party injured. But the balance "of inconvenience is strong against such an action. Witnesses "would be subjected to peril. A party might be allowed, by "his own single testimony against the oath of the witness, "to obtain a verdict and get large damages, whereas the rule "of law is that an oath shall never be deemed false or the "witness perjured on the unsupported testimony of a single "witness." Then he said[13]: "The case of *Revis* v. *Smith*[14] "is a very recent authority that though an affidavit made "in a judicial proceeding is false, slanderous and malicious, no "action will lie against the party making it. We have therefore "a large collection of cases where from time to time parties have "attempted to get damages in cases like the present, but in no "one instance has the action ever been held to be maintainable. "If for centuries many persons have attempted to get a remedy "for injuries like the present, and there is an entire absence of

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[8] (1859) 4 H. & N. 569.
[9] Ibid. 576.
[10] Ibid. 577.
[11] (1670) 1 Saund. 120.
[12] 4 H. & N. 569, 577.
[13] Ibid. 578.
[14] 18 C.B. 126.

"authority that such remedy exists, it shows the unanimous "opinion of those who have held the place which we do now, "that such an action is not maintainable." Crompton J.[15] concluded his judgment in that case by saying that the effort made in *Revis* v. *Smith*[16] to sustain an action analogous to an action for malicious prosecution seemed to have been made in despair—it was a despairing attempt.

But again, so far as this court is concerned, how can I possibly ignore what Lord Halsbury L.C. said in *Watson* v. *M'Ewan*[17]: "The broad proposition I entertain no doubt about, and it seems "to me to be the only question that properly arises here; as to the "immunity of a witness for evidence given in a court of justice, "it is too late to argue that as if it were doubtful. By complete "authority, including the authority of this House"—and in this I think that he is referring to *Dawkins* v. *Lord Rokeby*[18]—"it "has been decided that the privilege of a witness, the immunity "from responsibility in an action when evidence has been given "by him in a court of justice, is too well established now to be "shaken. Practically I may say that in my view it is absolutely "unarguable—it is settled law and cannot be doubted. The "remedy against a witness who has given evidence which is false "and injurious to another is to indict him for perjury; but for "very obvious reasons, the conduct of legal procedure by courts "of justice, with the necessity of compelling witnesses to attend, "involves as one of the necessities of the administration of justice "the immunity of witnesses from actions being brought against "them in respect of evidence they have given. So far the matter, "I think, is too plain for argument." That decision of the House of Lords in 1905 makes it unnecessary for me to consider at length the judgments in *Munster* v. *Lamb*,[19] and the other authorities cited to me today.

I hope that Mr. Ashe Lincoln will not think that I have been discourteous to him if I say that it seems to me that this is an obvious "try on." Attempts have been made over a period of 200 or 300 years to bring these actions, but they have universally failed. In my opinion, as Lord Halsbury said,[20] it is absolutely unarguable.

I therefore decide that the contention raised by the defendants in paragraph 16 of the defence is correct. It follows that paragraphs 21 and 22 of the statement of claim must be struck out as disclosing no cause of action.

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[15] 4 H. & N. 569, 579.

[16] 18 C.B. 126.

[17] [1905] A.C. 480, 486.

[18] (1875) L.R. 7 H.L. 744.

[19] (1883) 11 Q.B.D. 588.

[20] [1905] A.C. 480, 486.

Order accordingly.

Solicitors: *Barlow, Lyde & Gilbert; Basil Greenby & Co.*

J. F. L.

[LEEDS ASSIZES.]

WOODS *v.* MARTINS BANK LTD. AND ANOTHER.

1958
July 8, 9, 10, 11, 23.

Salmon J.

Banking—Duty to customer—Advice on investment—Liability to customer.
Practice and Procedure—Discovery—Affidavit of documents—Duty of solicitor.
Solicitor—Officer of court—Duty as—Discovery.

At the beginning of May, 1950, J., who was manager of a branch of a bank, in reply to a request by the plaintiff (who had no real business experience) to be his financial adviser, said that the bank would be only too pleased to take care of the plaintiff's financial affairs. On May 9, 1950, the plaintiff was induced to invest £5,000 in preference shares of B. R. Ltd., in consequence of advice previously given by J., but implicitly repeated on that day, that B. R. Ltd., who were customers of the bank, were financially sound and that the investment was a wise one to make. The plaintiff on that date, in a letter dictated by J., authorized the proceeds of certain investments to be paid to the bank so that they might pay for the shares out of the proceeds and retain the balance to his order. The balance, after the bank had paid for the shares, was put by them to the plaintiff's credit in a suspense account.

On June 1, 1950, the bank opened a current account for the plaintiff. Relying on further advice by J., the plaintiff subsequently invested a further £6,800 in shares in B. R. Ltd., and made a loan of £3,000 to the company in the form of an unregistered bill of sale. In February, 1952, the plaintiff signed a guarantee of the overdraft of F. A. Ltd. with the bank, relying on advice by J. that F. A. Ltd. were sound financially.

There were no grounds on which J. could reasonably have advised that B. R. Ltd. was in a sound or strong financial position, and still less could the investment in the shares be reasonably recommended as a wise one. Unknown to the plaintiff, B. R. Ltd. had with the bank a considerable overdraft, of which at all material times the district head office of the bank were pressing J. to

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[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

procure a reduction. Nor was there any reasonable ground for giving the advice in relation to F. A. Ltd.

The plaintiff lost the sum of £14,800 invested in B. R. Ltd., and was called upon to pay £990 3s. under his guarantee for F. A. Ltd., and claimed these sums from the bank and J. A claim based on fraud failed as it was found that J. honestly believed in the advice which he gave, but as to a claim in negligence:—

Held, (1) The limits of a banker's business could not be laid down as a matter of law; the nature of such a business must in each case be a matter of fact, and on the facts it was within the scope of the bank's business to advise on all financial matters, and they owed a duty to the plaintiff to advise him with reasonable care and skill in the transactions referred to.

Banbury v. *Bank of Montreal* [1918] A.C. 626; 34 T.L.R. 518 distinguished.

(2) That from May 9, 1950, when the bank accepted the plaintiff's instructions the relationship of banker and customer existed between them.

(3) That even if the plaintiff did not become a customer until later, the defendants would still have been under a duty to exercise ordinary skill and care in advising him in relation to the £5,000 transaction on May 9; a fiduciary relationship existed between the plaintiff and the defendants.

(4) That J. ought never to have advised the plaintiff without making a full disclosure to him of the conflicting interests between the plaintiff and the bank and the bank's other customers concerned.

(5) That as none of the advice was reasonably careful or skilful, and but for it the plaintiff would never have made any of the investments or given the guarantee, he had made out his case in negligence against both defendants.

Certain material documents were not disclosed in the defendant's affidavit of documents, and it should at all times have been obvious to the defendants and their solicitors that such documents existed.

Held, that the solicitors' duty did not stop at explaining to their clients that they must disclose all relevant documents which were or had been in their possession; solicitors owed a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, as far as possible, that no relevant documents had been omitted from their clients' affidavit.

ACTION.

The plaintiff claimed damages against the defendants, Martins Bank Ltd. and Joseph Johnson, the manager of their branch at 15, Lombard Street, Quayside, Newcastle-upon-Tyne, for fraudulent representations made by the second defendant, alternatively for negligence or alternatively for breach of an agreement to act as his financial advisers. The facts are fully set out in the judgment.

P. Stanley Price Q.C. and *J. A. Baldwin* for the plaintiff. On his own evidence the defendant Johnson is shown to have been making statements to his head office which he must have known to be untrue, and the plaintiff does not desire to abandon the allegation of fraud. Further, and particularly in view of the defendant bank's publications, it was clearly part of the bank's business to advise the plaintiff about his investments or his financial affairs, and in the absence of contrary indication this must include the placing of his investments. The plaintiff became a customer of the bank in May, 1950, when they accepted his instructions regarding the shares in the Alliance Building Society, and the defendants were under a duty to him from that time.

Banbury v. *Bank of Montreal*[1] is distinguishable, as in that case the plaintiff was not strictly a customer of the bank, and it was admitted that the manager had no general authority to advise. *Le Lievre* v. *Gould*[2] and *Candler* v. *Crane, Christmas & Co.*[3] are also distinguishable, as in the present case there was clearly a contractual or fiduciary relationship. In those circumstances, a duty of care was owed by the defendants to the plaintiff: *Batts Combe Quarry Co.* v. *Barclays Bank Ltd.*[4] There was argument between the plaintiff and the defendants to supervise his financial affairs and the defendants were under a duty to take all reasonable steps to maintain his credit: *Wilson* v. *United Counties Bank Ltd.*[5] Although it was no part of the defendant Johnson's duty when asked for information about the financial standing of a customer to supplement his knowledge by outside inquiries (*Parsons* v. *Barclay & Co. Ltd.*[6]), his own personal knowledge of the companies concerned was sufficient to put him on the alert without outside inquiry. He was in day-to-day contact with the affairs of the companies and knew the state of their accounts (*Crumplin* v. *London Joint Stock Bank Ltd.*[7]). He failed to exercise due care, and in consequence the plaintiff has suffered the loss for which he claims.

G. S. Waller Q.C. and *J. F. S. Cobb* for the defendants. The defendants were not guilty of fraud. They further rely on *Banbury* v. *Bank of Montreal.*[8] [The judgment of Scrutton L.J. in the Court of Appeal[9] was referred to.] They were under no duty of care to the plaintiff: see *Le Lievre* v. *Gould* [10] and *Low* v. *Bouverie*.[11] The instructions by the defendant bank to their managers show that it was no part of their business to advise on the sale or purchase of investments. The plaintiff did not open a current account until June 1, 1950, and, therefore, he was not a customer of the bank before that date. Such advice as the defendant Johnson gave to the plaintiff was given honestly, and although it turned out to be wrong, it was given with the care which he might reasonably be expected to possess as a bank manager. Even without that advice the plaintiff would still have acted as he did, and therefore his loss was not caused by either of the defendants.

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[1] [1918] A.C. 626; 34 T.L.R. 518.

[2] [1893] 1 Q.B. 491.

[3] [1951] 2 K.B. 164; [1951] 1 T.L.R. 371; [1951] 1 All E.R. 426.

[4] (1931) 48 T.L.R. 4.

[5] [1920] A.C. 102.

[6] (1910) 26 T.L.R. 628.

[7] (1913) 30 T.L.R. 99.

[8] [1918] A.C. 626.

[9] [1917] 1 K.B. 409, 427–442.

Cur. adv. vult.

July 23. Salmon J. read the following judgment: The plaintiff's father died in August, 1948. Approximately one year before he died he gave the plaintiff about £26,000 in cash, the bulk of which was invested by the plaintiff, under his father's guidance, in building societies. At about the same time the father established a fund of between £20,000 and £30,000 to provide an income for the plaintiff's step-mother for her life. When the plaintiff's father died death duties became payable on both sums to which I have referred. The plaintiff voluntarily contributed a large sum of money to his step-mother's fund so that she would not suffer any serious diminution in income by reason of the payment of death duties. Thereafter, the plaintiff had about £17,000 of free money, and, subject to his step-mother's life interest, he was entitled to a further sum of more than £20,000. The plaintiff had not long since left the services, and after a short time as a salesman in a retail store he had entered under his father's auspices a small motor business near the parental home. This was Connaught Motors Ltd. One Darling, in whom the plaintiff's father had had confidence, was the principal director. The plaintiff's investment in this company was £200. The name of this company was subsequently altered to True Shapes Ltd. when it changed its business to sheet metal working, and it will be necessary for me to refer to it again presently. At this time the plaintiff was a young man about 30 years old with no real business experience or knowledge of affairs. In my judgment, the plaintiff is a pleasant and honest young man but rather stupid and extremely gullible. These attributes can have been no less pronounced or obvious eight years ago than they are today. He was, in fact, the very prototype of the lamb waiting to be shorn. And he did not have long to wait.

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[10] [1893] 1 Q.B. 491.

[11] [1891] 3 Ch. 82; 7 T.L.R. 582.

In about the month of April, 1950, he met one Brock who was the moving spirit in a company called Brocks Refrigeration Ltd. This was a company which had then been in existence only a few months and whose business was to sell, instal and service refrigerators manufactured by J. & E. Hall Ltd. Between May, 1950, and October, 1951, the plaintiff sank £14,800 in this company, every penny of which he has lost. The plaintiff claims that he invested this money as a result of the advice given to him by the defendant bank through the defendant Johnson who was the manager of the defendant bank's Quayside branch at Newcastle-upon-Tyne. The plaintiff claims that this advice was given negligently or fraudulently.

The writ in this action was not issued until April, 1956. It is therefore apparent that the claim is a stale claim. The plaintiff gives as his principal reason for the delay in issuing the writ that he and his company True Shapes Ltd. became heavily involved with the bank and that he postponed bringing this claim until he was no longer in the hands of the bank. However this may be, it is obvious that such a stale claim must be scrutinized very closely. It would be easy for a young man who had improvidently lost a large amount of money, many years later to persuade himself that he had received bad advice from his bank manager, and that it was as a result of this advice that his money had been lost. If the defendant Johnson had been able categorically to deny the plaintiff's story, if he had said that the plaintiff never came to him for advice, and that he never did and never could have advised the plaintiff that Brocks Refrigeration Ltd. was in a sound financial position, or that it was wise for the plaintiff to make the investments in that company that he in fact made, then, in spite of the fact that the plaintiff impressed me as a most candid witness I might have found it difficult to accept his evidence. It seems to me strange that anyone with the slightest knowledge of financial matters could have considered the finances of Brocks Refrigeration Ltd. as sound in 1950 or 1951, or that the investments which the plaintiff made in that company were other than ludicrously imprudent. But the defendant Johnson admits in effect that the plaintiff did come to him for advice, and does not strongly challenge the fact that he may well have advised the plaintiff that the investments the plaintiff proposed making were wise and prudent investments. At any rate, the defendant

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Salmon J.

Johnson admits that he certainly told the plaintiff that if he, the defendant Johnson, had been able to make the same investments with his own moneys he would have done so. I am quite satisfied that the plaintiff received the advice from the defendant Johnson that the plaintiff says he received. I am bound to say that until I saw the defendant Johnson in the witness-box it seemed to me incredible that any bank manager could be sufficiently ingenuous or ignorant honestly to have believed in such advice. Having seen the defendant Johnson in the witness-box, however, I think that he did, in his muddle-headed way, honestly believe in the advice which he gave the plaintiff.

During the course of this judgment I shall have to refer to the memoranda passing between the defendant Johnson and the defendant bank's district head office. Most regrettably, these documents were not disclosed in the defendants' affidavit of documents although they are of the greatest materiality. It should at all times have been obvious to the defendants and their solicitors that such memoranda existed. Indeed, they are expressly referred to in some of the documents which were disclosed. I am certain that these documents were not purposely suppressed. Nevertheless, the defendants were grossly negligent in omitting these documents from their affidavit of documents. It was not until the trial was well advanced that these documents were produced on my direction. They were then found within a a very short space of time, and it was conceded that there was no excuse for their non-disclosure. No doubt the defendants' solicitors explained to their clients that they must disclose all relevant documents which were or had been in their possession. The solicitors' duty, however, does not stop there. It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their clients to make sure, as far as possible, that no relevant documents have been omitted from their clients' affidavit. In this case I am regretfully driven to the conclusion that this duty was not performed by the defendants' solicitors.

I find the following facts: In April, 1950, True Shapes Ltd. were interested in the project of manufacturing a product known as the Bolden Steriliser. The plaintiff and Darling were directors of this company. Its accountant and secretary was one Gordon Barr. At Barr's suggestion a meeting took place in the office between, amongst others, the plaintiff, Darling, Brock and the defendant Johnson in order to consider the proposal of Brocks Refrigeration Ltd. becoming the distributors of the Bolden Steriliser. It appears that this proposal was carried at the meeting. In point of fact Brocks Refrigeration Ltd. has never sold a single Bolden Steriliser, for no commercial Bolden Steriliser has ever been produced by True Shapes Ltd. At the meeting to which I have referred the defendant Johnson was introduced to the plaintiff as Brock's bank manager and financial adviser. Between the date of that meeting and May 9, 1950, the plaintiff met the defendant Johnson on three or four occasions. At this time the defendant Johnson had learned from Darling that the plaintiff was a man of considerable means. The defendant Johnson then set out to acquire and succeeded in acquiring for the defendant bank the custom of the plaintiff, True Shapes Ltd., and an associated company named Bolden Sterilisers Ltd. The defendant Johnson, as manager of the Quayside branch of the defendant bank, perfectly properly considered it part of his duty to attract such customers as he could for his employers. The defendant Johnson impressed upon the plaintiff that the Quayside branch of the defendant bank was a commercial branch and that he, as the manager of that branch, was at the very hub of financial business in the city of Newcastle-upon-Tyne and in a position to offer the plaintiff much better service than the manager of the suburban branch of the rival bank at which the plaintiff and True Shapes Ltd. were then customers.

By the beginning of May, 1950, the plaintiff was convinced of the defendant Johnson's financial experience and acumen and had complete confidence in the defendant Johnson's supposed knowledge and skill in financial affairs. The plaintiff asked the defendant Johnson if he would be his financial adviser, to which the defendant Johnson replied that the defendant bank would be only too pleased to take care of the plaintiff's financial affairs. Thereafter the defendant Johnson told the plaintiff that he might be able to get some preference shares for the plaintiff in Brocks Refrigeration Ltd. At this time, and indeed at all times, Brock was urgently in need of money for his company. Brock, who had then known the plaintiff only for a few weeks or months, was quite cunning enough to realize that the proposition to invest money in his company was more likely to attract the plaintiff if it came to him from a bank manager in whom he had confidence rather than from Brock, who would necessarily be an interested party. I have no doubt that the plaintiff asked the defendant Johnson whether Brocks Refrigeration Ltd. was financially sound and whether it would be wise for him, the plaintiff, to invest £5,000 in that company's preference shares. Brock and his company were, to the plaintiff's knowledge, customers of the defendants' Quayside branch. Accordingly the plaintiff rightly supposed that the defendant Johnson, in whose ability he reposed great confidence, had special knowledge of Brocks Refrigeration Ltd.'s financial affairs. It is to be observed that the defendant Johnson, as bank manager to the company, would be doing them a service by helping to introduce further capital, and he would also thereby be helping to reduce the company's overdraft, which, even as early as May 9, 1950, the district head office was suggesting, in the memoranda to which I have referred, ought to be reduced. He was in an invidious position in suggesting the investment to the plaintiff and in a still more invidious position when he was asked by the plaintiff for his advice. The defendant Johnson did, however, advise the plaintiff that Brocks Refrigeration Ltd. was financially sound and, if he were able to do so with his own money or if he were in the plaintiff's place, he would invest £5,000 in the company's 6 per cent. cumulative preference shares. This advice meant that the proposed investment was a wise and sound one for the plaintiff to make.

The plaintiff then had a conversation with one Sowerby, the manager of the Gosforth branch of Barclays Bank Ltd., with whom the plaintiff had banked for some time and from whom he had then almost been weaned by the defendant Johnson. As a result Sowerby accompanied the plaintiff to another interview with the defendant Johnson, and the defendant Johnson repeated before Sowerby the advice which he had previously given to the plaintiff. Sowerby has not been called as a witness by either side. I draw no inference from his absence from the witness-box except that it would have been difficult for him to give evidence against a former customer and equally difficult for him to give evidence against a rival bank. It seems to me that there were no grounds upon which the defendant Johnson could reasonably have advised that Brocks Refrigeration Ltd. was in a sound or strong financial position. No audited accounts existed. Such figures as the defendant Johnson had did not support the view that the company's finances were sound or strong. Their liquid assets were not sufficient to meet their current liabilities, even leaving out of account their not inconsiderable overdraft. Still less, in my view, could the investment by the plaintiff of £5,000 in preference shares in that company be reasonably recommended as a wise investment. The daunting risks of investing in a company of mushroom growth such as this, and, moreover, a company which was so clearly overtrading, should have been palpable even to the veriest tyro in financial affairs. The plaintiff had never in his life before this occasion bought a share. His inexperience and ignorance and dire need of advice should have been obvious, as I believe they were, to the defendant Johnson. I have no doubt that, but for the defendant Johnson's advice, the plaintiff would not have made the investment in Brocks Refrigeration Ltd. which he in fact made in May of 1950.

On May 9, 1950, the defendant Johnson dictated a letter for the plaintiff to sign. It is addressed to the defendant bank and it is in these terms: "I hand you herewith Alliance Building "Society passbook registered No. A.18370 showing investments "for £5,000 together with my letter of authority to that society "requesting them to pay to you the proceeds of that investment "against your discharge. On receipt of such proceeds please "pay the sum of £5,000 to the above mentioned company against "their acknowledgment and undertaking to issue to me 5,000 "6 per cent. preference shares of £1 each and retain to my order "the balance of the proceeds." The balance referred to in this letter amounted to between £40 and £50 and this sum was put to the plaintiff's credit in a suspense account opened for him by the defendant bank. In my view the defendant bank accepted the instructions contained in this letter as the plaintiff's bankers, and at any rate from that date the relationship of banker and customer existed between them. It is true that the express advice was in the first place given before the 9th May, but it was implicitly repeated on that day. On June 1, 1950, the defendant bank opened a current account for the plaintiff, and it is conceded that from this date the relationship of banker and customer existed between them.

At the beginning of October, 1950, the defendant Johnson told the plaintiff that he could acquire a further 2,500 preference shares in Brocks Refrigeration Ltd. He then told the plaintiff that this company was very strong financially and advised the plaintiff that it would be wise for him to subscribe for the shares. At this stage he knew that the plaintiff's disposable capital was about £17,000, £5,000 of which was already invested in the company's preference shares. The defendant Johnson had then no more reason than he had had in May for advising that the company was strong financially or that the investment was a wise one for the plaintiff to make. The plaintiff, relying on the defendant Johnson's advice, decided to make the investment and the defendant Johnson made out the cheque for £2,500 for the plaintiff to sign. The plaintiff signed it. The communications between the defendant Johnson and the district head office make it plain that prior to this transaction the company's overdraft had been allowed by the defendant Johnson considerably to exceed the permitted limit, and the district head office had been pressing the defendant Johnson to procure a reduction of the overdraft. The defendant Johnson in effect assured the district head office that the overdraft position would be eased by the additional capital, which he stated was £2,750. These facts were not disclosed by the defendant Johnson to the plaintiff.

In November, 1950, as appears from the defendants' internal memoranda, the defendant bank's district head office was again urging the defendant Johnson to procure a reduction of the company's overdraft. The defendant Johnson assured the district head office that this would be accomplished by the company unloading unwanted stock to the value of £3,000 upon factors. To the defendant Johnson's knowledge, as he admitted, the company tried unsuccessfully during November to unload £3,000-worth of stock upon factors and upon J. & E. Hall Ltd.

At the beginning of December, 1950, a meeting took place between the plaintiff, Brock and the defendant Johnson. The defendant Johnson told the plaintiff that the company had a quantity of stock valued at £5,000 to unload and that, in order to obtain liquid cash for expansion, the company was prepared to sell this stock to the plaintiff for £3,000 provided that the plaintiff would leave the stock with the company on the terms that the company would repurchase it from the plaintiff in nine months' time for £3,300. The plaintiff asked the defendant Johnson for his advice about this proposal, and, indeed, the defendant Johnson admits that he knew the plaintiff was looking to him for advice. The defendant Johnson recommended the plaintiff that it would be quite safe and wise for him to enter into this transaction. I think he did tell the plaintiff that the stock should be segregated. He did not tell the plaintiff that the real reason for the company requiring the £3,000 was to reduce the overdraft, nor did he tell him that the company had been trying unsuccessfully to sell the stock to factors and to J. & E. Hall Ltd. Relying on the defendant Johnson's advice, the plaintiff did enter into this transaction and certain documents came into existence which I must read. On December 16, 1950, the plaintiff wrote to the Rock Building Society in the following terms: "I shall be grateful to you if you will pay to Messrs.

"Martins Bank Ltd., Quayside Branch, Newcastle-upon-Tyne, "for credit of my account with them the sum of £3,000 out of "my above-mentioned funds with you and I hereby authorize "you to accept the bank's receipt as your full and sufficient "discharge. Please return the passbook to the bank with your "remittance. If you can expedite this I shall be obliged." On December 16, he wrote to the bank: "I hand you herewith my "Rock Building Society preference share passbook together with "an authority addressed to that society to pay the sum of "£3,000 to you for the credit of my account with you. Kindly "expedite the matter and retain the passbook when returned "to you." Then there was a letter from Brocks Refrigeration Ltd. to the plaintiff in these terms: "We hereby acknowledge "your cheque for £3,000 in payment of miscellaneous stock as "per attached schedule. In accordance with the arrangement "with you we agree to hold this said stock to your order in a "separate part of our stores and we hereby further agree that "there will be no storage charge and undertake to keep such "stock fully insured without cost to you. It is a condition of "the arrangement that you on your part will not dispose of any "or all of such stock for a period of nine calendar months from "the date hereof except to this company, Brocks Refrigeration "Ltd., and it is agreed between us that all such sales will be on "the basis of 10 per cent. added to the price at which we have "sold the stock to you as per the attached schedule. We "Brocks Refrigeration Ltd. hereby undertake to repurchase from "you piecemeal or in bulk on the terms stated herein the whole "of the stock within the said period of nine calendar months "from the date hereof. We enclose a duplicate of this letter "which please sign over the sixpenny stamp at the foot thereof "and return it to us." This was done. A list of the stock was drawn up and the summary at the end of the list is in the defendant Johnson's own handwriting. Although the transaction was in form a sale by the plaintiff to the company, in reality it was clearly a loan by the plaintiff on the security of the stock. The documents constitute an unregistered bill of sale, and accordingly afforded the plaintiff no security at all. It would be difficult to imagine a more imprudent transaction from the point of view of the plaintiff, though from the point of view of the company, who were also the defendant bank's customers, and from the point of view of the defendant bank itself the transaction had certain attractions. The defendant Johnson had no reasonable grounds for advising the plaintiff, as he did, that it was safe or wise for the plaintiff to enter into this transaction.

The plaintiff had now, as a result of the defendant Johnson's advice, sunk £10,500 of his disposable capital of about £17,000 in Brocks Refrigeration Ltd. If the company foundered (and there was a grave risk of its doing so, as should have been obvious to the defendant Johnson) the plaintiff would lose his money. If the company made a huge success, as the defendant Johnson no doubt hoped that it would, the equity shareholders would reap the benefit, but it would profit the plaintiff nothing. Any investment in Brocks Refrigeration Ltd. would have been unwise. An investment which gave the investor a share in the equity commensurate with the capital he was investing, though unwise, would at any rate have been a gamble, if an extremely hazardous one. The investment of £7,500 in preference shares and £3,000 in a loan had nothing to commend it. There is nothing to show that 6 per cent. was an unusually high yield in 1950 on preference shares in sound private companies. There is some evidence that at this time 3¾ to 4 per cent. was the average yield on preference shares in "blue chip" companies. One would expect such a difference of yield between a first class public company where the investor can at any time realize his investment and a private company where he cannot. There are two requirements for any preference share: (i) that the money invested shall be safe; and (ii) that the stipulated interest shall be paid. Any ordinarily prudent and competent bank manager, especially the bank manager of a commercial branch, should know that before advising the investment of money in the preference shares of any company, let alone a private company, he should be able to see from the balance-sheet figures that the financial position of the company is strong enough to ensure that the investor's capital is safe and from the trading history of the company that the interest would be paid. I cannot imagine that any ordinarily prudent and competent bank manager, on the facts and figures which the defendant Johnson had before him, could have advised the plaintiff to make any investments in preference shares of this company, whatever the supposed yield had been, still less that he would have advised a customer to enter into the £3,000 loan transaction.

In April, 1951, the company issued a debenture charging all its assets to the defendant bank. A little while before October 17, 1951, the plaintiff went to see the defendant Johnson to seek his advice, as the defendant Johnson admits, about a proposal that had been made to him by Brock. He told the defendant

Johnson that Brock had suggested that the plaintiff should invest a further £4,000 in the company's preference shares and should also acquire 300 ordinary shares of a nominal value of £1 each at par, with a seat on the board. The plaintiff explained that he had been told by Brock that the company needed additional capital for further development in the Yorkshire area. The defendant Johnson appeared to know all about the proposal. He confirmed that the company needed the extra capital of £4,000 for further development, and said that J. & E. Hall Ltd. had asked the company to extend their business in the Yorkshire area. He advised the plaintiff that it would be a very wise move on his part to take up the shares. Relying on this advice, the plaintiff decided to take up the shares, and made out cheques for £4,000 and £300, which he left with the defendant Johnson. At this time the permitted limit of the company's overdraft was £18,000 on the strength of the debenture, the company's assets having been assessed by the defendant bank at £25,000. The company had been allowed by the defendant Johnson to exceed this limit, and in fact had an overdraft of about £20,500. The district head office had been pressing the defendant Johnson, with some acerbity, to secure a reduction of the overdraft to within the permitted limit. The internal memorandum of October 17, 1951, shows that the defendant Johnson told the district head office that the company intended to consolidate and that "their present intense efforts will result in a considerable "reduction in the level of their requirements which after the "receipt of the £4,000"—from the plaintiff—"will be well "within the limit of £18,000 arranged with the bank." No mention of the company's overdraft was made by the defendant Johnson to the plaintiff. The defendant Johnson's statement to the plaintiff that the £4,000 was required for further development in the Yorkshire area was clearly untrue. Nevertheless, having seen the defendant Johnson, I am not satisfied that he realized that it was untrue. In his muddle-headed way he may well have thought that, as the permitted limit of the overdraft had been exceeded to finance development, the £4,000 subscribed to help reduce the overdraft could properly be described as required for further development. The defendant Johnson did not disclose to the plaintiff that a debenture had been issued to the bank, nor did he say a word to the plaintiff about the company's alarming trading position for the year ending October 31, 1951. It is true that the balance sheet and the trading and profit and loss account for the year 1951 were not then in the defendant Johnson's possession but he had been supplied with quarterly figures. During that year the company lost, according to its accounts, over £21,000. In October, 1951, the defendant Johnson had at any rate the balance sheet and trading and profit and loss account of the company for the year ending October 31, 1950. These showed that the liquid assets were not sufficient to meet current liabilities and that the average monthly expenditure exceeded the average monthly revenue. Indeed, it should have been apparent to any bank manager in the defendant Johnson's position in October, 1951, that the company was precariously balanced on the very knife-edge of insolvency and that disaster appeared to be only round the corner. Yet the defendant Johnson, with no conceivable justification, advised the plaintiff that it would be wise for him to invest a further £4,000 in the company's preference shares thus subscribing, with the £3,000 loan, more than half the total money invested in this company in order to obtain £300 worth of ordinary shares, that is to say about one-sixteenth of the equity, and a seat on the board, for all the good that that might then do him.

Shortly before this transaction, as the defendant Johnson well knew, the plaintiff's disposable capital had become exhausted. He had sunk £10,500 in Brocks Refrigeration Ltd. and a considerable sum in True Shapes Ltd., and the balance he had spent on himself. The defendant Johnson advised the plaintiff that he might get his hands on the fund set up by his father to provide his step-mother with an income by buying his step-mother a life annuity equal to her then income. This could apparently be done for about £5,000, leaving the plaintiff with the balance of the fund for his own enjoyment or to be invested in accordance with the defendant Johnson's advice. It was out of the moneys received from this fund that the £4,000 for preference shares was found in October, 1951. So urgent was the necessity on October 17, 1951, to reduce the company's overdraft or to obtain some further security against it that, until such time as the plaintiff was able to realize £4,000 worth of securities from his step-mother's fund, he was asked by the defendant Johnson to give, and he did give, a guarantee to the defendant bank of £4,000 in favour of Brocks Refrigeration Ltd. The plaintiff had only the haziest notion of what was happening in relation to this guarantee and relied entirely upon the defendant Johnson.

One day towards the end of October, 1951, the plaintiff, whose company, True Shapes Ltd., was then considerably in debt to the defendant bank, remarked to the defendant Johnson in relation to Brocks Refrigeration Ltd. that it was nice to be associated with a company whose account with the bank was in credit. The defendant Johnson told him that this company, far from being in credit, had an overdraft of £22,000. The plaintiff says that he was stunned. I believe him.

In February, 1952, there was an interview between the plaintiff and the defendant Johnson and Brock. A small private company called F. Adamson Ltd., in which Brock was interested and which was a customer of the defendant bank, required a guarantee of £1,000 on its bank overdraft. Brock, who, I am told and can well believe, had a magnetic personality and considerable powers of persuasion, in effect assured the plaintiff that the signing of the guarantee would be a mere formality and that there was no risk of the plaintiff being called upon to pay. The defendant Johnson confirmed this and advised the plaintiff that F. Adamson Ltd. was sound financially, and that its overdraft would undoubtedly be discharged by moneys outstanding that would be coming in during the next 12 months. The defendant Johnson advised the plaintiff that there was no real risk of his being called upon to pay under the guarantee. The defendant Johnson had no reasonable ground for giving this advice. I am satisfied that the plaintiff signed this guarantee relying upon the advice he received from the defendant Johnson. Ultimately the plaintiff was called upon to pay and did pay £990 3s. under this guarantee.

The plaintiff claims in this action the sum of £14,800 which he lost in Brocks Refrigeration Ltd., and the sum of £990 3s. which he was called upon to pay under his guarantee for F. Adamson Ltd. as damages for negligence, alternatively as damages for fraud, against the defendant bank and the defendant Johnson. I have already indicated that the claim in fraud fails, since I am not persuaded that the defendant did not honestly believe in the advice which he gave to the plaintiff. As to the claim in negligence, the defendants take the point that the defendant Johnson did not advise the plaintiff as he alleges. I am against the defendants on this point. It is clear from what I have already said that, in my judgment, the plaintiff did receive the advice from the defendant Johnson that the plaintiff says that he received.

The defendants' next point is that it was no part of their business as bankers to advise upon such financial transactions as the plaintiff entered into with Brocks Refrigeration Ltd. or in relation to F. Adamson Ltd., and that, accordingly, they were under no duty to advise the plaintiff carefully or competently in these matters. They say that, however careless or incompetent the advice the defendant Johnson gave the plaintiff may have been, since the defendants were under no duty to the plaintiff they are not responsible for any loss that may have been caused by that advice. They rely on the well-known cases of *Le Lievre* v. *Gould*,[1] *Low* v. *Bouverie* [2] and, in particular, on *Banbury* v. *Bank of Montreal*.[3] This latter case seems to me to turn on its own special facts, and particularly on the fact that the plaintiff there admitted that the bank manager "had no general authority to "advise—in other words, that it was not within the scope of the "bank's business to advise on investments at large," *per* Lord Parker of Waddington.[4]

In my judgment, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact and, accordingly, cannot be treated as if it were a matter of pure law. What may have been true of the Bank of Montreal in 1918 is not necessarily true of Martins Bank in 1958.

In considering what is and what is not within the scope of the defendant bank's business I cannot do better than look at their own publications. I look first at their advertisement. That is in these terms: "Although Martins is a bank with over 600 branches "and world-wide connexions, our system of decentralization "keeps us in touch with the customer's closest problems. We "have six district head offices with boards of directors and general "managers, so that the very best advice is available through our "managers virtually on your doorstep"; and the advertisement is headed "We share your problems." Then I consider their booklet. The material parts read as follows: "If you want help "or advice about investments our managers will gladly obtain for "you advice from the best available sources in such matters." I observe that the "best available source" in this case was the bank itself, who were the bankers for Brocks Refrigeration Ltd. and thus knew everything that there was to know, or were in a position to know all that there was to know, about that company's financial standing. The next passage I read is as follows: "In "all these matters strict secrecy is observed and your affairs will "not be divulged to any other person, relative or otherwise, with- "out your knowledge or permission. You may consult your bank

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[1] [1893] 1 Q.B. 491; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243.

[2] [1891] 3 Ch. 82; 7 T.L.R. 582.

[3] [1918] A.C. 626; 34 T.L.R. 518.

[4] [1918] A.C. 626, 702.

"manager freely and seek his advice on all matters affecting your "financial welfare. All these advantages are yours as the "possessor of a bank account, current or deposit, and in these "difficult days, when financial problems of one kind or another "always seem to be cropping up, it is a great comfort to know "that you have an impartial friend whose help you may seek "without obligation." I hardly think that it would be reasonable to construe those words as meaning "without obligation to the "bank." The words "you may consult your bank manager "freely and seek his advice on all matters affecting your finan-"cial welfare," seem to me to be in the widest possible terms. Then at the end of the booklet there is this paragraph: "We "have not gone into great detail, but if there is anything about "which you would like more information please call in at the "branch most convenient to you. We shall be delighted to make "your acquaintance and to help you with your finances in every "possible way, and we very much hope that you will have been "sufficiently attracted by the impressions you have formed after "reading this booklet to have made up your mind to join the "great band of satisfied customers who bank at Martins."

It is true that these publications saw the light of day only recently, but the defendant Johnson, who has a lifelong experience with the defendant bank and who was the only witness called on their behalf, said in evidence that the matters they speak to were as true in 1950 as they are today. I find that it was and is within the scope of the defendant bank's business to advise on all financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred. It is at any rate remarkable that the defendant bank, who seem to be keen competitors with other banks to obtain custom and who, in order to do so, apparently spend large sums of money in advertising that one of the advantages that they offer is expert advice in all financial matters without obligation, are taking the point in this court that they are under no duty to use any care or skill in giving such advice.

The defendant bank relies upon a book of secret instructions circulated to their branch managers. So secret is this book of instructions that the bank objected to producing it and produced only a photostat copy of the page containing instructions relating to stock exchange transactions. They read as follows: "As the "giving of advice to customers about stocks and shares other "than concerning procedure is fraught with danger, managers "must not directly advise the purchase or sale of any investment"; and a little lower down it says: "The order should be recorded in the stocks and shares bought and sold register and passed in writing to the broker." Then later it says: "Each branch should transact stock exchange business through the broker or brokers allotted to it by head office or district office, unless in any particular case a broker is specifically named by the customer." These instructions, which are headed "Stock Exchange Transactions," appear to relate only to stock exchange transactions and do not affect the kind of transactions with which this case is concerned. In any event these instructions do not, in my judgment, alter the true scope of the bank's business any more than any secret instructions issued by a firm of solicitors to their managing clerks forbidding them to advise on any particular legal topic save through counsel would cut down the scope of the firm's business vis-à-vis its clients.

The next point taken by the defendants is that the plaintiff was not a customer of the defendant bank at the date of the first transaction in May, 1950, in that no current account had then been opened by the plaintiff and that, therefore, they owed the plaintiff no duty of any kind, at any rate in respect of this transaction of May, 1950. I have already stated that, in my judgment, the plaintiff was a customer of the defendant bank on May 9, 1950. Nevertheless, even if he did not become a customer until later, the defendants would still, in my judgment, have been under a duty to exercise ordinary care and skill in advising him in relation to the £5,000 transaction. I have found that it is part of the defendants' business to advise customers and potential customers on financial matters of all kinds. In May of 1950 the plaintiff paid business not social calls on the defendant Johnson in his office. The plaintiff made it plain that he was consulting the defendant Johnson as manager of the defendant bank's Quayside branch. The plaintiff was a potential customer and one whose custom the defendant Johnson was anxious to acquire and soon did acquire. The plaintiff had asked the defendant Johnson if he would become his financial adviser, to which the defendant Johnson had replied that the defendant bank would be glad to take charge of his financial affairs. In my judgment, a fiduciary relationship existed between the plaintiff and the defendants. No doubt the defendant Johnson could have refused to advise the plaintiff, but, as he chose to advise him, the law in these circumstances imposes an obligation on him to advise with reasonable care and skill. This seems to me to be an even stronger case from the point of view of the plaintiff than cases of gratuitous deposit, such as *Giblin* v. *McMullen*,[5] or gratuitous services, such as *Whitehead* v. *Greetham*,[6] where it has been held that an obligation to use due care and skill may arise.

The defendants then take the point that the defendant Johnson was not negligent in the advice which he gave the plaintiff. Clearly the defendant Johnson was not negligent merely because his advice turned out to be wrong. Nor could he be negligent because he failed to exercise some extraordinary skill or care. His only obligation was to advise with the ordinary care and skill which the ordinary bank manager in his position might reasonably be expected to possess. It seems to me to be plain that in the circumstances of this case he ought never to have advised the plaintiff at all—certainly not without making a full disclosure to the plaintiff of the conflicting interests between the plaintiff and the defendant bank and the plaintiff and the defendant bank's other customers concerned. No one but an extremely foolish man or a knave could have given the plaintiff the advice given him by the defendant Johnson. As I have already indicated, I do not think that he is a knave. On the other hand, for the reasons stated earlier in this judgment, it is quite plain that none of the advice which he gave the plaintiff comes within measurable distance of being reasonably careful or skilful.

The last point taken by the defendants is that the plaintiff's loss was not occasioned by any negligence on the part of the defendants. It is argued that, even had the defendant Johnson advised the plaintiff against making any investment in Brocks Refrigeration Ltd. and against giving the guarantee, the plaintiff would still have acted as he did. The plaintiff did not strike me as being an over-confident young man or one who would not take advice. I think he had just enough sense to realize that he was no match for Mr. Brock, and I am certain that he relied entirely on the defendant Johnson's advice to protect him in his financial dealings with Mr. Brock. I hold that, but for the defendant Johnson's advice, the plaintiff would never have made any of the investments which he did make in Brock's Refrigeration Ltd., nor have given the guarantee in favour of F. Adamson Ltd. The fact that the plaintiff was the kind of young man who might have lost his money in other unwise transactions or soon spent it, perhaps more enjoyably, on extravagant living is beside the point. He has made out his case in negligence against both defendants and

[5] (1869) L.R. 2 P.C. 317.

[6] (1825) M'Cl. & Y. 205; 2 Bing. 464; 10 Moore C.P. 183.

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WOODS *v.* MARTINS BANK LTD.

has established that he has lost £15,790 by reason of that negligence. There must, accordingly, be judgment for the plaintiff against both defendants for that sum, with costs.

Judgment for the plaintiff against both defendants.

Solicitors: *Swinburn G. Wilson & Son, Newcastle-upon-Tyne; Criddle, Ord & Muckle, Newcastle-upon-Tyne.*

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July 15, 16, 17, 18, 21, 22, 23, 24, 31.

McNair J.

RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD.

[1955 R. 2318.]

Shipping—Bill of lading—Seaworthiness—Hague Rules—Damage to cargo due to defective storm valves—Negligence of workman of independent contractor—Whether shipowner liable for lack of due diligence—Whether liable for failure to take regular soundings—(Australian) Sea-Carriage of Goods Act, 1924 (*No.* 22 *of* 1924)—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1; *art. IV, r.* 2 (*a*).

Ships' Names—Muncaster Castle.

Negligence—Safe system of work—Plant and equipment—Latent defect—Principle governing employer's liability.

On May 7, 1953, 150 cases of tinned ox tongues were shipped on board the defendants' vessel at Sydney for carriage to London under bills of lading to which the plaintiffs were parties. The bills were made subject to the Australian Sea Carriage of Goods Act, 1924.[1] When the goods were discharged at London 113 cases were found to be damaged by sea water which had entered the hold by way of defective storm valves on the port and starboard side of the hold. Immediately before her outward voyage to Australia, the vessel was passed through her No. 2 special survey and her annual load line survey. For this purpose the marine superintendent employed by the defendants' agents instructed a reputable firm of ship repairers to open up all the storm valves and inspection covers. After the inspection by the Lloyd's surveyor, a fitter employed by the firm closed each inspection cover and secured it with nuts. Once the nuts had been hardened up no visual inspection would detect any unevenness in the position of the cover. No sea water entered the hold during the outward voyage and water was not discovered until the cargo was being unloaded in London. Regular soundings were taken in the hold throughout the voyage. The presence of the water in the hold was due to the negligence of the fitter, who failed sufficiently to secure the nuts on the inspection covers, with the result that the working of the ship loosened the nuts. The vessel with the hold in its present condition had remained classified by the classification society since she became a cargo vessel on conversion in 1948. There was no previous record of cargo damage in the hold. On a claim by the plaintiffs for damages for breach of contract:—

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[1] Australian Sea Carriage of Goods Act, 1924, Sch., art. III, r. 1: "The "carrier shall be bound, before and "at the beginning of the voyage, to "exercise due diligence to—(*a*) make "the ship seaworthy."

Art. IV, r. 2: "Neither the "carrier nor the ship shall be respon-"sible for loss or damage arising or "resulting from—(*a*) act, neglect or "default of the master, mariner, "pilot, or the servants of the carrier "in the navigation or management "of the ship."

Held, (1) that a carrier cannot be held liable for want of due diligence to make a ship seaworthy within article III, rule 1 (*a*), of the Hague Rules, where the unseaworthiness has resulted from the negligence of a workman employed by a competent ship repairer engaged by the carrier, the result of whose negligence would not be discoverable by appropriate surveys and inspections carried out in accordance with ordinary prudent practice; in the present case the defendants had discharged the burden of proving that they had exercised due diligence and, therefore, were not liable under article III, rule 1 (*a*), of the Act of 1924.

W. Angliss & Co. (Australia) Pty. v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456; 43 T.L.R. 675 applied.

Dictum of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628 and *Davie* v. *New Merton Board Mills Ltd.* [1958] 1 Q.B. 210; [1958] 1 All E.R. 67 considered.

(2) That the ship was not unseaworthy in design, but even if she was, this was not due to any want of due diligence on the part of the defendants.

Dictum of Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.* [1952] 2 Lloyd's Rep. 105, 130 applied.

Per curiam: Even if soundings had not been regularly taken such failure was something for which the defendants would not be liable by virtue of the exception in article IV, rule 2 (*a*).

ACTION.

Under a bill of lading signed at Sydney on May 7, 1953, by the agent of the defendants, Lancashire Shipping Co. Ltd., and incorporating the provisions of the rules in the Australian Sea Carriage of Goods Act, 1924, 150 cases of ox tongues were shipped on board the defendants' vessel, *Muncaster Castle*, for carriage to London. The plaintiffs, Riverstone Meat Co. Pty. Ltd., were indorsees of the bill of lading. On arrival at London 113 cases were found to be damaged by sea water.

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Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.

In an action by the plaintiffs for damages, it was claimed that the damage was caused by the unseaworthiness of the vessel, it being alleged, inter alia, that the inspection covers over the storm valves in the scupper pipes were defective, whereby sea water leaked into the hold and damaged the goods; alternatively, that the damage was caused by the negligence of the defendants in failing to discover by proper soundings the presence of water in the hold.

By their defence the defendants contended that they exercised due diligence to make the ship seaworthy and therefore were not in breach of article III, rule 1, of the Act of 1924, and if, contrary to their contention, no proper soundings were taken they were protected by the exception in article IV, rule 2 (*a*).

The facts are fully stated in the judgment.

Ashton Roskill Q.C. and *J. Franklin Willmer* for the plaintiffs. There are two questions of fact out of which the legal issues arise: (1) What caused water to enter the hold? and (2) Why was it not detected? The primary reason for (1) was the unseaworthiness of the ship caused by the negligence of the fitter in tightening the nuts of the storm valve inspection covers in No. 5 hold. The Hague Rules obligation to exercise due diligence to make the ship seaworthy is personal to the shipowner and, if the ship repairers' fitter is negligent, the shipowner cannot shelter behind the fact that the fitter is not employed by him. This is made clear by Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*[2] and also in *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*,[3] and in *International Packers (London) Ltd.* v. *Ocean S.S. Co. Ltd.*[4] the law was accepted as stated by Lord Wright. When considered in the light of the particular facts of the case the decision of Wright J. in *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*[5] does not conflict with this principle. If it does, the views of the same judge expressed later in the House of Lords are to be preferred. [Reference was made to *Cranfield Bros. Ltd.* v. *Tatem Steam Navigation Co. Ltd.*[6]; *Minister of Materials* v. *Wold S.S. Co. Ltd.*[7]; *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[8] and *G. E. Dobell & Co.*

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[2] [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[3] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658.

[4] [1955] 2 Lloyd's Rep. 218.

[5] [1927] 2 K.B. 456; 43 T.L.R. 675.

[6] (1939) 64 Ll.L.Rep. 264.

[7] [1952] 1 Lloyd's Rep. 485.

[8] (1937) 58 Ll.L.Rep. 33; [1937] W.N. 189.

v. *Rosemore Steamship Co. Ltd.*[9]] An owner does not discharge his duty by employing competent ship repairers. Here the defendants are liable because they had actual or imputed knowledge of the defects of the ship: see the *Angliss* case.[10] If the range of persons for whom the owner is responsible includes the fitter, the exception of a latent defect cannot apply. In any event no question of latent defect arises in the present case.

As to (2), the water was not detected because, it is submitted, soundings in No. 5 hold were not taken. If this is so, the defendants are not protected by article IV, rule 2 (*a*) because, it is submitted, failure to take soundings is not an act, neglect or default in the management of the ship but in the care of cargo.

Michael Kerr for the defendants. It is accepted that the ship was unseaworthy. But, if the fitter was negligent, no one can be blamed for not discovering the defect: *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[11] Shipowners cannot satisfy themselves about the competence of an independent contractor's workman. In *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*[12] the shipowners were held not to be liable for the negligence of their independent contractor's workmen. There is no distinction between builders and repairers, and, if the negligence of a repairer's workman is substituted for that of a builder's workman, the present case is directly covered by *Angliss's* case.[12] There is no point in inventing categories of builders, repairers and other contractors: see *per* Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*[13] The most satisfactory test is to inquire whether the shipowner would be vicariously responsible for the negligence of the defaulting workman.

Wilsons & Clyde Coal Co. v. *English* [14] is not in point, because all that was decided there was that an employer's duty with regard to a safe system of working in a coal mine could not be delegated to an agent. But repairing a ship is no part of its carriage by sea. *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[15] was concerned with the carrier's purported reliance on exemption clauses. [Reference was also made to *Minister of Materials* v. *Wold S.S. Co. Ltd.*[16]] *Angliss* [17] was affirmed by Lord Wright in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[18]—a Privy Council case. The obligation to exercise due diligence does not import any concept other than the common law concept of reasonable care. It does not widen the liability of a carrier nor alter the range of persons for whom he is responsible. The only difference is in the reversal of the burden of proof. The carrier has to discharge the burden of proving absence of negligence; at law the plaintiff had to prove negligence. Even if this view be wrong, provided that the repair yard adopted a proper system of working and there was no managerial failure with regard to it, a shipowner would not be liable for the casual negligence of an independent contractor's workman. [Reference was made to *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[19]; *The Assunzione*[20]; *F. C. Bradley & Sons Ltd.* v. *Federal S.N. Co. Ltd.*[21] and *G. E. Dobell & Co.* v. *Rosemore Steamship Co. Ltd.*[22]]

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[9] [1895] 2 Q.B. 408.
[10] [1927] 2 K.B. 456, 463.
[11] [1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405.
[12] [1927] 2 K.B. 456.
[13] [1952] 2 Lloyd's Rep. 105, 130.
[14] [1938] A.C. 57.
[15] [1939] A.C. 397.
[16] [1952] 1 Lloyd's Rep. 485.
[17] [1927] 2 K.B. 456.

If it should be found that soundings were not taken, reliance is placed on the exemption from liability for negligence in the navigation or management of the ship contained in article IV, rule 2 (*a*), of the Hague Rules. The failure to sound a hold is a failure to make use of a part of the ship. The use of the tarpaulins in *Gosse Millerd Ltd.* v. *Canadian Merchant Marine*[23] was said by Viscount Sumner to be solely a cargo operation, and therefore article IV, rule 2, did not apply in that case, where the decks were insufficiently protected by the tarpaulins. But soundings are not a cargo operation and are concerned with the safety of the ship. Similarly, in *C. H. Smith & Sons* v. *P. & O. Steam Navigation Co. Ltd.*,[24] where there was a failure to use the pumps to clear the ship of a small quantity of water, the presence of which was known, it was a failure to take care of the cargo, and article IV, rule 2, afforded no protection. But a failure to take soundings is mismanagement of the ship. The present case is indistinguishable from *International Packers (London) Ltd.* v. *Ocean S.S. Co. Ltd.*,[25] where there was a failure to use locking bars over one of the hatches on the exposed weather deck, and it was held to be a failure in the management of the ship. Sounding pipes are a defence against water remaining in the ship. American cases support the contention that the pumping of water out of a leaking ship is a primary obligation of seafaring. [Reference was made to *The Silvia*[26]; *The Mexican Prince*[27]; *The British King*[28]; *The Sandfield*[29]; *The Ontario*[30] and *The Merida*.[31]]

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[18] [1934] A.C. 538, 547.

[19] 58 Ll.L.Rep. 33.

[20] [1956] 2 Lloyd's Rep. 468.

[21] (1927) 24 Ll.L.Rep. 446.

[22] [1895] 2 Q.B. 408.

[23] [1929] A.C. 223, 240.

[24] (1938) 60 Ll.L.Rep. 419.

[25] [1955] 2 Lloyd's Rep. 218.

Ashton Roskill Q.C. in reply. With regard to article IV, rule 2 (*a*), the question is whether, assuming failure to take soundings, such failure was neglect or default in the management of the ship. Was it not primarily neglect or default in connexion with the cargo? A distinction must be drawn between a want of care directly affecting the cargo and a want of care indirectly affecting the cargo: see the *Gosse Millerd* case.[32] The general obligation to exercise due diligence must not be whittled down by an over-generous interpretation of article IV, rule 2 (*a*). Where a vessel is filled with cargo, the taking of soundings directly affects cargo. The scope of the exception must be assessed in relation to the facts of the case. It cannot be measured in vacuo.

On its facts, *International Packers (London) Ltd.* v. *Ocean S.S. Co. Ltd.*[33] is a long way removed from the present case. *C. H. Smith & Sons* v. *P. & O. Steam Navigation Co. Ltd.*[34] is, on its facts, nearer. It would be a strange result—which the court should hesitate to adopt—that if a shipowner is prudent in detecting water, but negligent in disposing of it, he is liable, whereas, if he is negligent in detecting the water, he avoids liability.

Reliance is placed on *Mersey Docks and Harbour Board* v. *Gibbs*[35] for the proposition that, if knowledge of the cause of a mischief makes a person responsible for it, he is equally responsible if the cause is not discovered. In that case the harbour board neglected their duty of maintaining and preserving the dock, so that a ship was damaged on a bank of mud. Blackburn J. said[36] that the harbour board would be liable if, though ignorant of the bank of mud, they had the means of knowledge and ought to have known of it. The American cases relied on by the defendants are based on the view that everything with which a vessel is equipped against the inroads of the sea—adopted as a test in *The Silvia*[37]—concerns the management of the ship. That view is not consistent with the decision of the House of Lords in the *Gosse Millerd* case,[38] nor with the interpretation of

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[26] (1898) 171 U.S. 462.
[27] (1897) 82 Fed. 484.
[28] (1898) 89 Fed. 872.
[29] (1897) 79 Fed. 371; 93 Fed. 623.
[30] (1900) 106 Fed. 324.
[31] (1901) 107 Fed. 146.
[32] [1929] A.C. 223.
[33] [1955] 2 Lloyd's Rep. 218.
[34] 60 Ll.L.Rep. 419.
[35] (1867) L.R. 1 H.L. 93.
[36] Ibid. 102.
[37] 171 U.S. 462.
[38] [1929] A.C. 223.

The Glenochil[39] and *The Ferro*[40] by the House of Lords in *Gosse Millerd.*[41]

The shipowners' obligation of exercising due diligence to make the ship seaworthy was here sought to be performed through the ship repairers' fitter. The shipowners gave instructions to the repairers and the work of tightening the nuts of the inspection covers was left entirely to the fitter. Accordingly, the repairers and their servant, the fitter, were the agents of the shipowners for the performance of the due diligence obligation. The contention that, for the shipowners to be liable, there must be a contract between the person who actually does the work (i.e. the fitter) and the shipowners is untenable; it suffices if there is a contract between the owners and the repairers. Moreover, in the present case, the owners gave specific instructions for all the inspection covers to be opened up. There is nothing in the *Angliss* case[42] that confines the shipowners' liability to the case where the negligent person is in direct contractual relationship with the shipowner. To exercise due diligence the shipowner must put the ship through the appropriate surveys. The men engaged in the necessary work are performing the shipowners' obligation of exercising due diligence and, if the work is negligently done, the obligation is not fulfilled.

The *Angliss* case[42] is distinguishable from the present case, because the court was there dealing with builders, not with repairers given specific instructions by the owners. If it is not distinguishable, it should not be followed in view of Lord Wright's statement of the law in *Wilson's* case[43] and *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[44]

The use of the term independent contractor in the present context may be misleading. A may be an independent contractor as regards X's liability to B, but he may be an agent as regards X's liability to C. Whether he is an agent depends on the circumstances of the particular case. The agent responsible for opening up and closing the inspection covers was the fitter, and the fitter was responsible for discharging the shipowners' obligation of due diligence.

The damage here was caused by the unseaworthiness of the ship and therefore the burden of proving that due diligence was

[39] [1896] P. 10.
[40] [1893] P. 38.
[41] [1929] A.C. 223.
[42] [1927] 2 K.B. 456.
[43] [1938] A.C. 57, 80.
[44] [1939] A.C. 397, 403.

exercised is on the defendants (article IV, rule 1). On the facts this burden has not been discharged.

Cur. adv. vult.

July 31. McNair J. read the following judgment: This case raises interesting questions as to the proper construction and effect of article III, rule 1, and article IV, rule 2 (*a*), of the rules scheduled to the Australian Sea Carriage of Goods Act, 1924, which are in identical terms with the corresponding provisions in the British Carriage of Goods by Sea Act, 1924.

On May 7, 1953, there were shipped on board the defendants' vessel, the *Muncaster Castle*, at Sydney under bill of lading of that date 150 cases of tinned ox tongues for carriage to London. The plaintiffs were parties to that bill of lading either as original shippers or as indorsees. The goods in question were stowed in the after half of No. 5 lower hold. When these goods were discharged at the Royal Albert Dock, London, towards the end of July, 1953, the contents of 113 cases out of 150 were found to be damaged by sea water which had entered No. 5 hold by way of defective storm valves on port and starboard sides of that hold, no water having been detected in that hold until the evening of July 16, four days after the vessel arrived in London.

In these circumstances the plaintiffs alleged (1) that the damage was caused by the unseaworthiness of the vessel as particularized finally as follows: "(a) The inspection covers over "the storm valves in the port and starboard scupper pipes "situated in the forward frame space of No. 5 hold were defective "whereby sea water leaked into No. 5 lower hold and damaged the "said goods. (b) No. 5 hold was so constructed that any water "entering the said hold collected forward unless the ship was "trimmed well by the stern. There was no drain-well in the "forward part of the said hold and consequently, with the ship "trimmed as she was at all material times until after commencement "of discharge in London, the water which had leaked into "the said hold through the said inspection covers could not drain "away. Nor was there any means of finding out whether there "was water present in the forward part of the said hold, or, if so, "what the depth was. (c) The cargo in No. 5 hold was so "closely stowed that even when the ship was trimmed by the "stern sufficiently to overcome the incline of the ceiling the water "which had leaked into the said hold through the said inspection "covers could not drain, or could not drain sufficiently easily "and quickly, into the drain-well at the after end of the said "hold." The plaintiffs allege (2), alternatively, that the damage was caused by the negligence of the defendants, their servants or agents in failing to discover by proper soundings the presence of water in No. 5 lower hold. I have omitted certain other particulars of negligence which were abandoned during the hearing before me.

The defendants' defence may be summarized as follows: (1) that as carriers they exercised due diligence to make the ship seaworthy and, accordingly, are not in breach of their obligation under article III, rule 1, and (2) that if, contrary to their contention, no proper soundings were taken, they are protected in respect of such failure by the exception contained in article IV, rule 2 (*a*), of "act, neglect or default . . . in the navigation or "management of the ship."

It will be convenient at this stage to emphasize that the allegations of unseaworthiness as developed at the hearing before me are of three different types: (1) unseaworthiness resulting from the defective condition of the inspection covers over the storm valves, the defect alleged being either (a) that the nuts securing the inspection valves were insufficiently or improperly hardened up, or (b) that the rubber jointings of the inspection covers were perished; (2) unseaworthiness resulting from the design of the sounding or draining arrangements in No. 5 lower hold in that there was no drainage or sounding arrangement in the forward part of that hold, and (3) unseaworthiness by reason of the close stowage of the cargo in No. 5 lower hold preventing the water from draining into the drainage well aft.

The *Muncaster Castle* (8,000 tons gross, 4,800 tons net) is a standard C.3 type vessel, of which many were built in the United States of America during the last war. Though conforming in general hull form and structure to that type, she was originally completed as an aircraft carrier and converted into a cargo carrier in 1948. So converted she conformed in all material respects to a C.3 type cargo vessel. On conversion she was classified with the British Corporation (which was united with Lloyd's Register in 1949) and remained so classified at all material times. In 1949 she was acquired by the defendants, together with another sister ship, the *Greystoke Castle*, and remained in their service, I think, until 1955. Throughout her service with the defendants she was well maintained and no criticism was directed against her maintenance.

No. 5 hold is the aftermost of the five cargo holds. As appears from the plans put in before me, this hold is 82 ft. long, narrowing from 52 ft. at her forward end to 8 ft. at the after end owing to the fining of the vessel's lines aft. The hold ceiling is level and bare throughout its length except that below the square of the hatch there is a permanent wooden tank top ceiling 6 ins. above the hold ceiling.

At the base of the web frames and main frames on either side and behind the vertical spar ceilings there are small drainage holes designed to permit water, which might enter forward and find its way into the wings, to drain aft. At the starboard side at the after end there is a sounding pipe leading to the bare hold ceiling divided from the drain-well or hat box, also aft, by a solid longitudinal bulkhead 3 ft. 6 ins. long and extending upwards to deck level. The drain-well can be drained into the tunnel shaft immediately below by a drainage cock. Apart from this, there are no means for clearing water from the hold.

In the foremost frames on both port and starboard sides there lead down from the weather deck two scupper pipes by which water from the scuppers on the weather deck can find its way by means of a clack type storm valve through the shell plating out into the sea. For the purpose of this judgment it is sufficient to say that the open outlet to the sea leads from an inspection chamber which is closed at the top by the inspection cover lying in the horizontal plane. This is bolted to the top of the inspection chamber by four nuts affixed to corresponding studs in the top of the inspection chamber itself. Between the inspection cover and the top of the inspection chamber is a rubber jointing or gasket. Suspended from the inspection cover and inside the inspection chamber is a hinged clack or clapper which, when in the closed position, closes the outlet from the scupper pipe into the inspection chamber. When water comes down the scupper pipe, the clack or clapper opens and allows the water to run out-board. Per contra, when water comes in from the sea, as it may when the vessel rolls or is struck by a wave, the force of water impinging on the clack closes the valve and the force of the water is expended against the inspection cover if properly secured. If the inspection cover is not properly secured or the jointing is defective, this water may find its way into the hold, as in fact happened on the occasion in question.

When the vessel is fully loaded down to her marks on an even keel, the outlet to the sea would, according to the figures given by Mr. Roskill in opening, though different figures were given in evidence, be about 2 ft. above the water line: as loaded on this voyage when on an even keel the outlet would be about 2 ft. 9 ins. above water level, but as for most of the voyage she was trimmed by the stern, the outlet would for a substantial part of the voyage be at or near the water line.

In February, 1953, immediately before her outward voyage to Australia, the vessel was passed through her No. 2 special survey by Lloyd's Register surveyors and reported to be "so far "as seen in good condition and eligible to remain as at present "classed in the register book," this being the highest class for vessels not actually built under the supervision of the society. On the same occasion she was passed through her annual load line survey. Under the Load Line Rules, 1941, made under section 42 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provision is made for the examination at the annual survey of the discharges leading through the ship's side from spaces below the freeboard deck. In practice, the surveyors are content if only 25 per cent. of the sea outlets are opened up for inspection on the annual survey, but the defendants insist on all being opened up. Accordingly, for the purpose of this survey, Atkinson, the experienced and competent marine superintendent of Moller Line U.K. Ltd., the managers of the ship, who was attending to the ship on this survey on behalf of the owners, gave instructions to Messrs. Alex Stephens, who are admittedly a ship repairing firm of the highest repute, to open up the storm valves, including the two in question, for inspection. This necessarily involved opening up the inspection covers. Thirty-one storm valves, including the two in question, were opened up for inspection by surveyors of Lloyd's Register, acting as assigning authority on behalf of the Minister of Transport, and the load line certificate was duly renewed.

After the inspection by Lloyd's surveyor, it would be the duty of a fitter employed by Alex Stephens to close each inspection cover by placing a new rubber jointing or gasket between the inspection cover and the top of the inspection chamber, placing the inspection cover over the studs in the top of the inspection chamber and tightening up the nuts. The process, as explained to me, was similar to the more familiar process of refitting the cylinder head to a motor-car engine after decarbonizing. The proper method of tightening up the nuts is not dissimilar to the proper method of fitting a spare wheel and tyre. The nuts are first placed in position and lightly secured. Then the nuts are tightened at opposite angles so as to secure that the pressure all round is even. If the nuts are tightened up in the wrong order, i.e., all the nuts on one side before the nuts on the other side, the pressure will be uneven and it will be impossible to make a secure joint even though all the nuts are hardened up so as to ring true when tapped with the spanner. I am satisfied that, according to ordinary and prudent practice, this work of tightening up, which is a task well within the competence of a skilled fitter, is left to the fitter, and is not in fact supervised by Lloyd's surveyors or the owners' superintendent. Furthermore, once the nuts have been hardened up, no visual inspection would detect any unevenness in the positioning of the cover or any insufficiency in hardening up.

After the valves had been so closed up, the scupper pipes were submitted by the chief officer to the usual hose test, i.e., a hose was inserted at weather deck level. Such a test, however, would not disclose a leaky inspection cover, but only whether the pipe or valve was blocked.

On March 15, 1953, the vessel sailed from Glasgow with general cargo for Australian ports. None of the cargo carried on the outward voyage in No. 5 hold was damaged by sea water. At Sydney the outward cargo stowed in the after half of No. 5 hold was discharged. The hold was then inspected by the chief officer. This inspection revealed no sign of leakage of sea water into the hold on the outward voyage. The plaintiffs' cargo was then loaded in the after half part of No. 5 lower hold. It was probably stowed at the bottom of this hold, though the exact position and extent of the stow was not established. On May 7 the vessel sailed for Brisbane, where the remainder of the outward cargo in No. 5 hold, namely, that stowed forward, was discharged. This involved that the places where the storm valves were situated were visible. The hold was again examined by the chief officer; no sign of sea water staining or of rust was found. I am satisfied that in fact these examinations were properly carried out and that, in fact, no sea water did enter through the storm valves or at all into No. 5 hold on the outward voyage.

On the homeward voyage there was some heavy weather on May 31, June 5, 6, 7, 13 and 16, sufficient to make the vessel roll and pitch, and on one occasion sufficient to justify a reduction of speed, but the weather was in no way abnormal for such a voyage. Nevertheless, it was sufficiently severe finally to loosen the nuts of the inspection cover if these were initially improperly hardened up and had become loosened in the working of the ship on the outward voyage.

After discharging cargo at Hull the vessel docked at the Royal Albert Dock on July 13. Discharge from No. 5 hold started on July 14 and continued throughout July 15 and 16 without, so far as the records show, any water being found. However, when the p.m. soundings were taken by the carpenter on July 16 by means of the sounding pipe at the after end of No. 5 hold, 1 ft. 3 ins. of water was found. This was the first indication received by the chief officer or the master that there was in fact water in that hold. At that time there was still cargo covering the whole of the hold ceiling. The chief officer, clambering over the cargo and looking through the vertical spar ceiling, could see water below, but could not then discover the source of entry. The next day, when more cargo had been removed, he observed a rust streak on the starboard side and another less pronounced on the port side leading from the storm valves. Subsequent examination showed that the water had come in from interstices which had developed between the inspection cover and the top of the inspection chamber on both sides. The chief officer formed the impression at the time that the pressure on the jointing was uneven, the rubber jointing itself appearing to be intact and in position.

Without reviewing the evidence further, it is sufficient for me to say that the most probable cause of the admission of sea water on the homeward voyage is that the fitter at Glasgow negligently failed to secure the nuts on the inspection cover evenly or sufficiently, with the result that the working of the ship on the outward voyage was sufficient to produce the condition, by the time the plaintiffs' cargo was loaded at Sydney, that the nuts had been loosened to such an extent that with the vessel rolling and waves striking the sides of the ship seawater was forced through the interstices below the inspection covers, and I so find. I am not satisfied that either of the rubber jointings themselves was defective. So far as there was direct evidence on this point from Captain Robson, the cargo superintendent, and the chief officer, it was to the effect that the jointing appeared to be in sound condition.

This finding is sufficient to support the plaintiffs' first allegation of unseaworthiness; but I am also satisfied that unless the defendants are in law responsible for the negligence of the fitter, as I have found it, they have discharged the onus of proving the exercise of due diligence so far as concerns the inspection covers.

Before considering the legal issues involved, it is convenient that I should first deal with the question whether, as the plaintiffs allege, it is established that no soundings were in fact taken of No. 5 hold until the p.m. soundings on July 16. The taking of soundings was the duty of the ship's carpenter under the general supervision of the chief officer. The ship's carpenter was not called before me, the explanation being that he had left the ship some years ago and could not be traced. This explanation I accept. His soundings book for the outward and homeward voyage has, however, been produced, and under the heading of No. 5 hold shows day by day merely a dash or no entry at all, whereas in the case of all the other holds a figure or the cypher "0" appears for both morning and evening soundings. In the soundings book for the previous 12 months the position is the same, except that invariably a dash appears for No. 5 hold sounding. In this book the earlier entries were made by the chief officer himself before the carpenter in question joined the ship. The chief officer, who spoke of the carpenter as a reliable man, was quite confident in his evidence that in fact soundings were taken regularly of No. 5 hold. The chief officer gave me the impression that he was a witness of truth and careful in his evidence. For instance, when asked in cross-examination if he had any recollection of himself having seen the carpenter taking soundings in No. 5 hold, he said: "It would be fairer to say that if I had seen him stop at "No. 4 hold, I would have taken him up."

I confess that I found some difficulty in understanding why the form of the negative findings for No. 5 hold should differ from the form of the negative findings entered for the other holds; but I think the master was probably correct in the suggestion that the difference was accounted for by the fact that No. 5 hold was the only compartment in which the sounding was made onto the bare tank top or hold ceiling, the other soundings being taken in sounding wells.

Furthermore, if it be the fact, as I find it to be, that the presence of water in No. 5 hold was first ascertained on the evening of July 16 by the carpenter taking the p.m. soundings, the inference is almost inescapable that this sounding was a routine sounding taken in the normal carrying out of the carpenter's duty, and was not an exceptional sounding first taken on that day. As against this, it is, of course, difficult to understand why, if regular soundings were taken, the water was not discovered earlier, especially since it is a reasonable inference from the description of the damage found as given by Messrs. Perfect

Lambert, the cargo-owners' surveyors, that the damage to part at least of the cases must have occurred a considerable time before the discharge. In this connexion it is relevant to refer to an incident spoken to by the chief officer. It appears that in 1950, after carrying a coal cargo from the United States to Japan, attempts were made to clean No. 5 hold by means of a hose. The vessel was 8 ft. by the stern and, I think, listing. It was found that the water from the hose was trapped forward owing partly to the list and partly to the blocking of the drainage holes in the web frame and main frames and had to be baled out. Thereafter, this hold was never hosed down for cleaning, and thenceforth it was, I think, appreciated that in certain conditions the hold soundings of No. 5 hold would not be entirely reliable. Capt. Robson also speaks to finding water trapped forward after completion of discharge of cargo in London on the voyage with which I am concerned. Nevertheless, Casebourne, the expert engineer called on behalf of the defendants, whose evidence I found to be entirely reliable and carefully given, told me that there is nothing unusual in finding 40 or 50 gallons of water held up in an after hold after a coal cargo, and that, if the owners had been informed about the incident at the time, it would not have been reasonable to require them to fit a drain-well or sounding pipe forward. It was, in his view, quite possible that with the water entering slowly forward it may be prevented from draining aft through blockage by refuse of the drain holes in the frames. The most probable explanation, as it seems to me, is that the water was initially trapped forward in this way, and that as it seeped through to the after end of the hold it was held up by the close stowage of the cargo until finally the dam holding the water up was broken down in the course of discharge, and with the alteration of trim in the course of discharge it finally reached the soundings pipe. Whatever difficulties there may be in this explanation, they are not, in my judgment, sufficient to persuade me to disbelieve the evidence of fact given by the chief officer. I, accordingly, find that regular soundings were taken in No. 5 hold throughout the voyage.

For completeness I should add, though it is more strictly relevant to a later stage in this judgment, that I accept Casebourne's view based on his examination of the plans and on his inspection of the hold itself and his wide experience in matters of this kind, that this hold was in design reasonably fit for the carriage of cargo and had no peculiarity which required departure from the normal practice of having a drain-well and soundings pipe only at the after end of the hold.

I am now in a position to deal with the first question of law, namely, whether on proof that unseaworthiness has resulted from the negligence of a workman employed by a competent ship repairer engaged by the shipowner, the result of whose negligence would not be discoverable by Lloyd's surveyors or the owners' marine superintendent carrying out their duties in accordance with the ordinary prudent practice of such persons, the shipowner should properly be held liable for failure to exercise due diligence to make the ship seaworthy.

Since the decision of the Court of Appeal in *G. E. Dobell & Co.* v. *Rosemore Steamship Co. Ltd.*[1]—a decision upon the effect of section 3 of the Harter Act, 1893, under which the shipowner is given certain statutory protection conditional upon the exercise by him of due diligence to make the ship seaworthy—it has been accepted that due diligence must be exercised " by the owner " himself or the agents whom he employs to see to the sea- " worthiness of the ship." The negligence in issue in that case was the negligence of the ship's carpenter in the direct employment of the shipowner, and no question of the negligence of a servant of an independent contractor arose or was discussed.

In *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*,[2] one of the earliest decisions under the legislation of 1924 incorporating the Hague Rules, Wright J. took occasion to examine exhaustively the content of the obligation to exercise due diligence. In that case the plaintiffs' goods were damaged by oil fuel or the fumes therefrom leaking through into the cargo hold from an oil fuel bunker owing to a defective deck bar. The findings of fact are summarized thus[3]: " (1) The design of the bar and of " its fitting was inadequate and defective, and there should have " been a cofferdam, but these defects of design involved no " failure of due diligence on the part of any person concerned, " having regard to the fact that carriage of oil fuel in such " circumstances had not then been the subject of sufficient " experience and having regard to the existing current standard " of knowledge in such matters; (2) there was some bad work- " manship both in riveting and in fitting the bar to the bulkhead " which was entirely the fault of the individual workman

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[1] [1895] 2 Q.B. 408.

[2] [1927] 2 K.B. 456; 43 T.L.R. 675.

[3] [1927] 2 K.B. 456, 458.

"employed by the builders and could not have been detected by "any reasonable care on the part of the defendants' inspector, "or by Lloyd's inspector, or the Board of Trade inspector, or by "the builders' foremen; (3) the damage to the plaintiffs' cargo "was due to the defects of design, although it may have been "contributed to by the bad workmanship."

On these findings the judge stated the legal position to be as follows[4]: "The obligation of the carrier to exercise due "diligence to make the ship fit is clearly not limited to his "personal diligence. The carrier may be a company and, in any "case, in the complication of modern affairs and by reason of the "widely scattered situation of seaports, he must act by agents "or servants, which is the phrase employed in article IV (2) (*q*). "The question is: How wide is the category of agents or "servants with reference to the obligation now being considered. "It is contended by the plaintiffs that, as the primary obligation on the carrier is to provide a seaworthy ship, the carrier "cannot delegate any part of that obligation so as to relieve "him of his personal liability, and he must accordingly be "accountable for lack of due diligence on the part of the "shipbuilders and their workmen, who are to be deemed to be "his agents, to make the ship seaworthy and fit, and that, "therefore, the defendants must be held liable for the bad "workmanship of which I have found the shipbuilder's men "guilty, and which I have not excluded as a contributing cause "of the actual damage. I do not think that this contention is "sound."

Then the judge deals with the history of the Act and its development, and continues[5]: "Under the old rule the only "relevant question was whether the ship was seaworthy or "unseaworthy. That rule was no doubt well adapted to more "simple days when ships were not very complicated wooden "structures of a few hundred tons, but in modern times, when "ships are complicated steel structures full of complex "machinery, the old unqualified rule imposed too serious an "obligation on carriers by sea, and I think that the new Acts "have intended to emphasize the specialization which has "developed in modern times and to emphasize the distinction "between carrier and shipbuilder, and limit the carrier's obligation to due diligence in his capacity as carrier. He is liable "for all such duties as appertain to a prudent and careful carrier

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[4] [1927] 2 K.B. 456, 460.

[5] [1927] 2 K.B. 456, 461.

"acting as such by the servants and agents in his employment. "If he has a new vessel built he will be liable if he fails to "engage builders of repute and to adopt all reasonable pre-"cautions. He may be held bound to require, for instance, the "builders to satisfy one of the well-known classification "societies, such as Lloyd's, or to engage skilled naval architects "to advise him and skilled inspectors to supervise the work. "In the same way, if he buys a ship he may be required to "show that he has taken appropriate steps to satisfy himself "by appropriate surveys and inspections that the ship is fit for "the service in which he puts her. But I do not think in any "case that the carrier can be held guilty of want of due diligence "simply because the builders' employees have put in some bad "work which, though concealed, renders the vessel unfit."

"In the present case the defendants employed an inspector "to supervise the work. I have held that that inspector used "due diligence. It may well be that, if he had negligently "passed bad work which he saw, or even, perhaps, which he "ought to have seen, the carrier would be liable for want of "due diligence on the part of one to whom he had delegated "the task of inspecting the work, although such supervision, "it may be, cannot be other than general or go to every detail "of the workmanship. Similarly, the carrier might perhaps be "held liable if the naval architect whom he employed to super-"vise the design, applying current standards, failed to detect a "definite error in design, although I do not think that he would "be so liable for an error on the part of one of the classification "societies, such as Lloyd's, which occupy a public and quasi-"judicial position. He might also be liable if, either personally "or by his scientific advisers, he chose a special form of "construction which involved, according to current standards, a "known risk—for example, if he chose to dispense with a coffer-"dam so as to increase his cargo space although the best opinion "thought a cofferdam necessary. Again, the need of repairing "a ship may cast on the carrier a special duty to see, as far as "reasonably possible, by special advisers for whom he is "personally responsible, that the repairs adequately make good "the defects."

I have read that passage in full because, in my opinion, this judgment has since that date been accepted by the profession as stating the legal position authoritatively and accurately, and I have no doubt that the innumerable disputes between shippers and cargo owners have been settled on the basis of this judgment.

The passage in the judgment dealing with the shipowner's responsibility in the case of repairs effected by competent ship repairers was adopted and applied by Singleton J. in *C. H. Smith & Sons* v. *P. & O. Steam Navigation Co. Ltd.*[6] The only other reported case in which the decision in *Angliss*[7] has been affirmed so far as I know until recent years is the decision in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[8] in the Privy Council, where Lord Wright said[9]: "What is meant in the (British) Sea Carriage of Goods "Act by due diligence to make the ship seaworthy was discussed "in *W. Angliss & Co.* v. *P. & O. Steam Navigation Co.*[10]: it is "not limited to personal diligence on the part of the owner." But I do not read Lord Wright's observations there as indicating that he was in any way resiling from the view which he had expressed as a judge of first instance in 1927.

It is argued, however, by the plaintiffs that a different view was expressed by Lord Wright in *Wilsons & Clyde Coal Co.* v. *English.*[11] The point for decision in that case was whether the appellants as mine owners, being under a common law duty to exercise reasonable care in the provision of a safe system of work, were to be held to have discharged that duty by the appointment of a competent manager under section 2 (4) of the Coal Mines Act, 1911, the facts arising at a time when the doctrine of common employment was still applicable. The Court of Appeal in *Fanton* v. *Denville*[12] (a case dealing with the parallel duty as to the provision of plant) had held that the employer is only liable "if personal negligence is proved and "that if the failure to supply or maintain the plant or machinery "in a safe condition is due to the negligence of a manager to "whom the duty has been entrusted by the employer, the "employer is not responsible unless it can be shown he failed to "use reasonable care to select a competent manager, or that he "has in some way been guilty of personal negligence in con-"nexion with the instalment or maintenance of the machinery "or plant or in permitting the continuance of its use after he "became aware of its unsafe condition." Lord Wright, after discussing that case and the earlier decisions of the House, concludes

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[6] (1938) 60 Ll.L.Rep. 419, 423.

[7] [1927] 2 K.B. 456.

[8] [1934] A.C. 538; 51 T.L.R. 5.

[9] [1934] A.C. 538, 547.

[10] [1927] 2 K.B. 456.

[11] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[12] [1932] 2 K.B. 309; 48 T.L.R. 433.

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as follows [13]: "... in truth the employer's obligation, as it has "been defined by this House, is personal to the employer and has "to be performed by the employer per se or per alios. If I may "take an analogy or instance of a similar personal obligation, I "note that the Carriage of Goods by Sea Act, 1924, requires a "shipowner to exercise due diligence or to take reasonable care to "provide a seaworthy ship. The shipowner is almost certainly "not an expert naval architect, engineer or stevedore. So far as "I know it has never been claimed that the obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert: the shipowner is absolutely held to the fulfilment of "the obligation. It is the obligation which is personal to him "and not the performance."

To the same effect are Lord Wright's observations in *Northumbrian Shipping Co. Ltd.* v. *Timm* [14]: "The obligation "to make a ship seaworthy is personal to the owners, whether "or not they entrust the performance of that obligation to "experts, servants or agents. They cannot say that there was a "miscalculation merely due to the negligence of their servants." In neither of these cases does it appear that the *Angliss* case [15] was cited in argument; but I cannot believe that Lord Wright can have forgotten his decision in that case, or can have intended to throw any doubt upon its correctness.

In *Waddle* v. *Wallsend Shipping Co. Ltd.*[16] Devlin J., following Wright J. in the *Angliss* case,[17] after being referred to *Wilsons & Clyde Coal Co.* v. *English*,[18] held,[19] on a claim by the widow of a deceased member of the crew of the *Hopestar*, that the shipowners were not liable for a defect in design whether it was due to the builders or Lloyd's Register surveyors.

I was also referred to a decision of my own in *International Packers (London) Ltd.* v. *Ocean Steamship Co.*,[20] in which I am reported to have said [21] as regards the obligation to exercise due diligence that the shipowner "cannot escape on proof that he "had employed a competent independent contractor who was in "fact negligent." I think that the reference to the *Angliss* case [22] which follows makes it clear that what I had in mind was the appointment of a competent independent surveyor. Though

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[13] [1938] A.C. 57, 80.

[14] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658.

[15] [1927] 2 K.B. 456.

[16] [1952] 2 Lloyd's Rep. 105.

[17] [1927] 2 K.B. 456.

[18] [1938] A.C. 57.

[19] [1952] 2 Lloyd's Rep. 105, 130.

[20] [1955] 2 Lloyd's Rep. 218.

[21] Ibid. 236.

[22] [1927] 2 K.B. 456.

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I have not preserved the notes of my judgment, I have read through my notes of the argument in that case, and it is clear that no submissions were made to me as to the position of an independent contractor or his servants. The use of that term by me in the judgment was either a slip or a mistake in reporting. I am quite clear I had not in mind the question of the negligence of the servant of an independent contractor such as a ship repairer or shipbuilder.

Accordingly, upon the authorities to which I have referred, I should have had little doubt about holding on the facts of the present case that the defendants should not be held liable for the casual negligence of the fitter employed by competent independent contractors such as Alex Stephens, when, as I have found, their own competent surveyor was not negligent in failing to detect this bad workmanship by the fitter.

However, Lord Wright's observations in *Wilsons & Clyde Coal Co.* v. *English* [23] have recently been considered by the Court of Appeal in *Davie* v. *New Merton Board Mills Ltd.*,[24] apparently without citation of his decision in the *Angliss* case.[25] In *Davie's* case [26] the question at issue was whether the employers were liable to the workman for injury sustained in the use of a tool purchased by the employer from competent suppliers, who in turn purchased the tool from a competent manufacturer, who in fact was negligent on the particular occasion in the manufacture of the tool in question. Jenkins L.J., in a dissenting judgment in favour of the workman, stated the legal proposition in terms wide enough to be fatal to the defendants in the present case. After referring to Lord Wright's speech in *Wilsons & Clyde Coal Co.*,[27] he said [28]: "If the law was, as it might quite reasonably "be, that an employer discharged his duty of taking reasonable "care to provide sound tools by having them made by a "reputable manufacturer or buying them ready made from reput-"able suppliers, the first defendants here could no doubt repel "the charge of negligence now brought against them by showing "that they bought the drift which turned out to be defective "from reputable suppliers, and that the defect was not one "which they could have discovered by reasonable inspection. "But the law as it is does not, as I understand it, accept reliance "on the care and skill of others as a performance of the duty.

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[23] [1938] A.C. 57, 80.

[24] [1958] 1 Q.B. 210; [1958] 1 All E.R. 67.

[25] [1927] 2 K.B. 456.

[26] [1958] 1 Q.B. 210.

[27] [1938] A.C. 57.

[28] [1958] 1 Q.B. 210, 231.

"Therefore (to apply Lord Wright's language) the first defen-"dants did not, in buying the drift from Baldwin & Co. Ltd., "perform the duty per se: nor did they perform it per alios, "since the second defendants unfortunately failed to take "reasonable care in the making of the drift."

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Parker L.J., in referring to the principle stated in *Bain* v. *Fife Coal Co.*,[29] as approved in *Wilsons & Clyde Coal Co.*,[30] said [31]: " . . . it is, I think, clear that this principle holds good whether "the person employed by the master is a servant, a full-time "agent or an independent contractor. It is true that in *Wilsons'* "case the person under consideration was a manager employed "by the owner of a mine, but all that was said there is equally "applicable to the case of an independent contractor. Indeed, "Lord Wright gave as an illustration the case of a shipowner who "employed an expert naval architect, engineer or stevedore to "make his ship seaworthy—persons who in general would be "independent contractors." But later the Lord Justice states the proposition on the basis of which he decided in favour of the employer in the following terms [32]: " . . . it seems to me that "the plaintiff can only hold the defendants liable if the true duty "of a master is not merely to take reasonable care to provide "a reasonably safe tool, but to provide a tool which has been "manufactured with reasonable skill and care, even when the "manufacturer is in no contractual relationship with the master. "Unless constrained to do so by authority, I would be loth to "hold that there was any such duty. Subject only to a defect "latent to the manufacturer, and ordinarily this will not arise "by reason of his expert knowledge, such a duty would amount "to a warranty that the tool was safe."

Pearce L.J., in referring to Lord Wright's speech, said [33]: "Again, it is noticeable that Lord Wright in the passage which "I have read refers to the naval architect, the engineer, the "stevedores, as people for whose neglect the shipowner will find "himself vicariously liable. He does not refer to the ship-"builder. It seems to me unlikely that he was intending to "express a principle by which every subsequent purchaser of the "ship will be liable to his employee for some undiscoverable "defect due to the original negligence of the shipbuilder. By "undiscoverable defect I mean a defect that though patent to

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[29] 1935 S.C. 681, 693.

[30] [1938] A.C. 57.

[31] [1958] 1 Q.B. 210, 238.

[32] Ibid. 239.

[33] Ibid. 248.

"the shipbuilder during the construction was not discoverable by "subsequent purchasers using reasonable care."

I have considered these judgments with anxious care, but I have come to the conclusion that they do not compel me to hold that the decision of Wright J. in the *Angliss* case [34] has been impliedly overruled. On the contrary, I think that the passage from the judgment of Parker L.J., which I have cited, reinforces the submission made to me on behalf of the defendants in the present case, that acceptance of the construction sought to be put on article III, rule 1, by the plaintiffs would be in effect to substitute for the new qualified obligation as to seaworthiness, the old absolute warranty of seaworthiness, except in rare cases of the true latent defect in the sense of defects not discoverable by care on the part of anyone. It would, in my view, be unfortunate if the development of the common law as to the employer's duty to his workmen, which resulted in part at least from the natural desire to avoid the harsh results of the doctrine of common employment before its repeal, led almost accidentally to an alteration in the content of the obligation of the shipowner towards the cargo owner, which had, as I believe, been authoritatively defined over 30 years ago.

I, accordingly, hold that the defendants have discharged the burden of proving that they exercised due diligence so far as concerns the inspection cover.

I now turn to the second allegation of unseaworthiness, namely, unseaworthiness by the design of the drainage and sounding arrangements in No. 5 hold. I have already stated earlier my acceptance of Casebourne's view that there was no such peculiarity in the hold in question as to require departure from the normal practice of fitting drainage-wells and sounding pipes in the after part of the hold. The vessel, with the hold in the present condition, has remained classified by the classification society since she became a cargo vessel on conversion in 1948, having passed through her initial and periodical surveys. According to the evidence of the ship's officers, which I accept, there was no previous record of cargo damage in this hold. I hold that the ship was not unseaworthy in design as alleged, and, further, that if, contrary to my finding, she was unseaworthy in that respect, I find that this was not due to any want of due diligence on the part of the defendants. I accept and apply the observation of Devlin J. in *Waddle* v. *Wallsend Shipping Co.*

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[34] [1927] 2 K.B. 456.

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RIVERSTONE MEAT CO. PTY. LTD.
v.
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Ltd.,[35] that to require a shipowner to go behind the classification society's certificate would involve a retrogression beyond the point to which a reasonable shipowner can be expected to go.

I can also dispose shortly of the third allegation of unseaworthiness based upon close stowage. This contention, like the allegation last considered, depends wholly upon the alleged peculiarity of the hold in question. This I have negatived. I would add that there was no evidence, or no evidence acceptable to me, that the stowage was in any way improper. It was admittedly the normal stowage habitually employed at Australian ports for a general cargo such as the cargo in question. I, accordingly, negative unseaworthiness on this ground.

The conclusion which I have reached, that in fact the soundings were regularly taken in No. 5 hold, makes it unnecessary that I should express a final view on the second main question of law, namely, whether failure to take soundings is covered by the exception in article IV, rule 2 (*a*), of "act, "neglect or default of the master, mariner, or pilot, or the "servants of the carrier in the navigation or management of "the ship." But, as it was indicated to me that this case may be considered by another court, and in view of the careful and exhaustive arguments which were addressed me on this point, it is probably convenient that I should deal with it.

I have recently had occasion in *International Packers* (*London*) *Ltd.* v. *Ocean S.S. Co. Ltd.*,[36] to review the relevant English authorities and certain American authorities on this question, and no useful purpose would be served in setting out my conclusions again in this judgment, especially as in the argument before me in the present case it was not suggested, as I understand it, that my appreciation of the authorities was erroneous. In the *Packers'* case [36] I came to the conclusion that the failure on the part of the ship's officers to fit locking bars over one of the hatches on the exposed weather deck at a time when severe weather was to be anticipated, fell within the exception, notwithstanding that the amount of water which in fact entered did not endanger the ship as such. I quote: "This failure resulted in "the failure of one of the ship's main defences against the entry "of sea water."

Broadly, the point may be put as follows: A ship at sea only keeps afloat by securing that sea water is not in the ship. This process involves (a) preventing the admission of sea water, for example, by having effective hatches and by properly securing the valves at the outlets at or near the sea level; (b) the taking of proper soundings to detect the presence of sea water, soundings being required whether the ship is in ballast or carrying cargo and being required not only for cargo holds, but also for any other compartments in which sea water may enter; and (c) pumping sea water out when it has been detected as having entered or, it may be, pumping periodically. Each of these operations, it is argued, is required for the ship, and their neglect is, to use the language of Greer L.J. in *Gosse Millerd* v. *Canadian Merchant Marine*[37] (which was approved in the House of Lords) "neglect "to take reasonable care of the ship or some part of it as distinct "from the cargo," or, to use the language of Sir Francis Jeune P. in *The Glenochil*[38]: "A want of care of the vessel indirectly "affecting the cargo." Further, as regards soundings, it is said that the quality of the act, namely, whether it is neglect of the vessel or neglect of the cargo, cannot be determined by the extent of the water which would have been found if the soundings had been taken.

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[35] [1952] 2 Lloyd's Rep. 105, 130.

[36] [1955] 2 Lloyd's Rep. 218, 234.

I was usefully referred to a number of American decisions on this point arising under the Harter Act, 1893. The leading case in the U.S.A. is apparently *The Silvia*,[39] in which the Supreme Court, affirming Brown J.[40] and the New York Circuit Court of Appeals,[41] held, following *The Glenochil*,[42] that the failure of the ship's officers to fix iron covers inside the glass port holes, whereby in rough weather sea water entered the ship, was covered by the exception in question. Gray J., in delivering the judgment of the court, said that the words in question "include at the least the control during the voyage of "everything with which the vessel is equipped for the purpose "of protecting her and her cargo against the inroad of the seas; "and if there was any negligence in not closing the iron covers "of the ports, it was a fault or error in the navigation or "management of the ship. This view accords with the result "of the English decisions upon the meaning of these words." In passing I emphasize the words "during the voyage" and "for "the protection of her and her cargo against the inroad of the "seas" as distinguishing this judgment from the judgment of

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[37] [1928] 1 K.B. 717; 45 T.L.R. 63; [1929] A.C. 223.

[38] [1896] P. 10.

[39] (1898) 171 U.S. 462.

[40] (1895) 64 Fed. 607.

[41] (1895) 68 Fed. 230.

[42] [1896] P. 10.

Scrutton L.J. which was disapproved in the House of Lords in the *Gosse Millerd* case.[43]

In *The Mexican Prince*,[44] Brown J. (who was also the trial judge in *The Silvia*,[45] and, indeed, in most of the cases to which I was referred) held that failure to test a valve leading to a cargo hold before pumping out water from a neighbouring hold was within the exception as being a failure to use a means of safety provided by the owners. This decision was affirmed by the Circuit Court of Appeals[46] without a reasoned judgment, after the decision of the Supreme Court in *The Silvia*. Again, in *The British King*,[47] the same trial judge held that failure to take soundings and to apply the pumps was covered by the exception. This decision was also affirmed by the Circuit Court of Appeals,[48] again without a reasoned judgment, after the decision of the Supreme Court in *The Silvia*. See also *The Sandfield*[49] (failure to open sluice gate designed for emptying bilges). In *The Ontario*[50] Brown J. again held, following *The British King*,[51] that failure to keep pumps going to deal with a known accumulation of water was also within the exception, and, finally, in *The Merida*,[52] a Circuit Court of Appeals held that failure to take soundings and to use pumps for the removal of the water was within the exception.

The only English case to which I have been referred in which the failure to use pumps has been considered is *C. H. Smith & Sons* v. *P. & O. Steam Navigation Co. Ltd.*,[53] in which Singleton J., having found that the shipowners had failed to exercise due diligence to make the ship seaworthy and were accordingly liable, also held that they were in breach of their obligation under article IV, rule 2 (*a*), in that the presence of sea water having been found, the officers failed to use the pumps to clear the water, and for that failure the shipowners were not protected by the exception. This decision, if sound, leads to the odd result that if the failure to take soundings is, as the United States authorities suggest, an act, neglect or default in the management of the ship and, accordingly, the ship would have been protected if no soundings had been taken, yet if soundings are taken and disclose the presence of sea water, the ship is not

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[43] [1928] 1 K.B. 717.
[44] (1897) 82 Fed. 484.
[45] 64 Fed. 607.
[46] (1899) 91 Fed. 1003.
[47] (1898) 89 Fed. 872.
[48] (1899) 92 Fed. 1018.
[49] (1897) 79 Fed. 371; 93 Fed. 623.
[50] (1900) 106 Fed. 324.
[51] 89 Fed. 872.
[52] (1901) 107 Fed. 146.
[53] 60 Ll.L.Rep. 419.

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protected if proper steps are not taken to remove the water found. It is not necessary for me to express any opinion as to the correctness of the decision of Singleton J. on this point, which may well be justified on the particular facts of that case. I can summarize my opinion as follows: If it had been necessary for me to express a concluded judgment on the question of whether the failure to take soundings was within the exception, I should on the authorities, both English and American, without doubt have held that it was. If, as I believe to be the case, the failure to secure the hatches on an exposed weather deck in rough weather, or when rough weather is to be anticipated, resulting in the absence of one of the main defences of the ship against the inroad of sea water, is within the exception, it would seem to me, as at present advised, logically and inevitably to follow that the failure to take soundings, which may result in dangerous quantities of sea water not being discovered, is also within the exception.

There must, accordingly, be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Clyde & Co.; Botterell & Roche.*

J. D. P.

C. C. A.

1958 *July* 14, 28.

Devlin, Donovan and Ashworth JJ.

REGINA *v.* CHAPMAN.

Criminal Law—Abduction—Unmarried girl under eighteen—"Unlawful sexual intercourse"—Meaning—Sexual Offences Act, 1956 (4 & 5 *Eliz.* 2, *c.* 69), *s.* 19 (1).

The words "unlawful sexual intercourse" in section 19 (1) of the Sexual Offences Act, 1956,[1] mean illicit sexual intercourse, that is, intercourse outside the bond of marriage.

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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[1] Sexual Offences Act, 1956, s. 19: "(1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. (2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of eighteen or over and has reasonable cause for the belief."

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APPEAL against conviction.

The appellant, Frank Chapman, a married man with four children, in December, 1957, took an unmarried girl, aged 16 years and a few months, away from her parents' house at Southampton to Basingstoke. There they stayed at his sister's house, slept together and had intercourse. He then took her to Winchester to the house of another of his sisters, to whom he introduced her as his wife. From Winchester the girl was taken back home by the police. He was charged before Stable J. and a jury at Winchester Assizes with having committed an offence against section 19 of the Sexual Offences Act, 1956. He pleaded not guilty to the charge, but was convicted and sentenced to 18 months' imprisonment on March 24, 1958. Leave to appeal was given by the Court of Criminal Appeal solely for the purpose of enabling the appellant to argue the point of law which he took unsuccessfully before the trial judge, namely, whether the intended intercourse in this case could properly be described as "unlawful" as required by section 19 of the Act of 1956.

I. A. Kennedy for the appellant. The prosecution's contention that all intercourse not licensed by marriage is unlawful is too wide. "Unlawful" should mean contrary to some enactment of positive law, and to show unlawful sexual intercourse within section 19 (1) of the Sexual Offences Act, 1956, the prosecution must show that the intercourse obtained was intercourse prohibited by law. The Act defines intercourse, but not unlawful intercourse, and therefore reference must be made to the general law.

The canon law cannot be considered today, and though intercourse may be immoral, the question is whether it is unlawful. The term "unlawful intercourse" when used in different sections of the Act may sometimes be surplusage, as in section 8 when dealing with the case of mental defectives, but it should not be regarded as surplusage in section 19 unless it is clearly so. Reliance is placed on the speech of Lord Halsbury L.C. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*[2]: "A "totally separate head of unlawfulness has, however, been "introduced by the suggestion that the thing is unlawful because "in restraint of trade. There are two senses in which the word "'unlawful' is not uncommonly, though, I think, somewhat "inaccurately used. There are some contracts to which the law

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[2] [1892] A.C. 25, 39; 8 T.L.R. 182.

"will not give effect; and therefore, although the parties may "enter into what, but for the element which the law condemns, "would be perfect contracts, the law would not allow them to "operate as contracts, notwithstanding that, in point of form, the "parties have agreed. Some such contracts may be void on "the ground of immorality; some on the ground that they are "contrary to public policy; as for example, in restraint of trade: "and contracts so tainted the law will not lend its aid to enforce. "It treats them as if they had not been made at all. But the "more accurate use of the word 'unlawful,' . . . , namely, as "contrary to law, is not applicable to such contracts." Where there are two meanings to a word and the word has not been used with precision, the court should apply the more restrictive meaning. In *Hayes* v. *Stevenson*[3] a man who went to a dwelling-house for purposes of fornication was convicted under the Vagrancy Act for being found in a house for an unlawful purpose. His conviction was quashed on appeal because fornication was not an unlawful purpose. Unlawful purpose was held to mean some purpose prohibited by positive law.

The earliest statutes which preceded section 19 (1) forbade the taking away of a woman to marry or defile her. Later Acts made it an offence to unlawfully and carnally know and abuse any woman child under 10 years. The immediate predecessor of section 19 of the Act of 1956 was section 7 of the Criminal Law Amendment Act, 1885, which made it an offence to abduct a girl under the age of 18 with intent that she shall be unlawfully and carnally known whether by any particular man or generally. The legislature was expressly choosing a form of wording for an offence illegal per se: compare section 49 of the Offences against the Person Act, 1861, and sections 3 and 4 of the Offences against the Person Act, 1875.

If "unlawful" in this context does not mean contrary to positive law, then it must refer to an act of such a quality of illegality or immorality that it would give rise to a forfeiture under a lease where there was a covenant by the lessee not to commit any nuisance or permit any illegal or immoral user of the premises. The cohabitation of unmarried persons is not sufficient by itself. Section 2 (*a*) of the Act of 1885 made it an offence to procure a girl under 21 years of age to be unlawfully carnally known by men, while section 2 (*b*) of the same Act made it an offence to procure her becoming a common prostitute, and section 2 (*c*) to procure her becoming an inmate of a brothel. When dealing with unlawful carnal knowledge in that section, the legislature was equating it with offences relating to prostitutes and brothels. That section was designed to protect girls against prostitution. At its highest, unlawful intercourse must mean intercourse not dissimilar to that carried on in brothels—that is, open immorality.

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[3] (1860) 3 L.T. 296.

J. H. Inskip, for the Crown, was not called upon.

DEVLIN J. said that the appeal would be dismissed and the court's reasons given later.

Cur. adv. vult.

July 28. DONOVAN J. The judgment I am about to read is the judgment of the court.

The court has already dismissed this appeal, for reasons which we now proceed to give.

[His Lordship stated the facts, read section 19 of the Sexual Offences Act, 1956, and continued:] The appellant's main contention is that the word " unlawful " in section 19 connotes intercourse which is forbidden by law, and that since the girl was over 16 it was not so forbidden in this case, however immoral it was. Alternatively, he says that the section applies only if the girl is taken away for intercourse under circumstances such as would constitute the breach of a covenant in a lease not to create a nuisance, for example, to a house used as a brothel.

It is curious that the point has not apparently arisen before, because the Act of 1956 is a consolidating measure, and there is a long history behind many of its provisions, though not so long behind section 19 itself. The researches of Mr. Kennedy have revealed that in the reign of Philip and Mary, for example, a statute was passed making it an offence to take an unmarried girl under the age of 16 out of the possession and custody and against the will of the father (4 & 5 Philip and Mary, c. 8). No particular intent, however, was specified as an ingredient of the offence.

By the statute 18 Eliz. 1, c. 8, s. 4, it was enacted that if any person should unlawfully and carnally know any woman-child under the age of 10 it should be a felony. It is difficult to suppose that " unlawfully " in this context meant contrary to some positive enactment. One would think that all intercourse with a child under 10 would be unlawful; and on that footing the word would be mere surplusage. The same expression was used when this section was re-enacted in 1828 by 9 Geo. 4, c. 31, s. 17.

Section 49 of the Offences against the Person Act, 1861, made it an offence to have "illicit" carnal connexion with a woman or girl under 21, if procured by false pretences or fraud; and section 50 re-enacted that it should be an offence unlawfully to have carnal knowledge of a girl under 10. The precursor of section 19 of the Act of 1956 is, however, section 7 of the Criminal Law Amendment Act, 1885, which provided that a person commits an offence who takes an unmarried girl under 18 out of the possession and against the will of her parents with the intent that she shall be "unlawfully and carnally known" by any particular man or generally. This is now in substance re-enacted in section 19 of the Act of 1956. No great assistance is to be derived for present purposes from the language used in these earlier statutes, except that it does suggest that the word "unlawfully" in relation to carnal knowledge has not been used with any degree of precision. It would be natural, however, for the framers of a statute, in days when the canon law would be more in their minds than today, to refer to any intercourse outside the bond of matrimony as "unlawful"; and for their successors when drafting consolidating Acts simply to repeat the word without a close consideration of its necessity or precise meaning.

We reject the argument that in section 19 of the Act of 1956 the word "unlawful" connotes intercourse contrary to some positive enactment. The argument, at once, prompts the question why, if the intercourse in question is already positively forbidden, section 19 should do it again. The answer suggested on behalf of the appellant is that under section 19 the law can step in before unlawful intercourse actually occurs and so prevent the mischief. This is perhaps a little imaginative when one considers the circumstances of most abductions; but the answer seems to us to be this: the plain purpose of section 19 is to protect young unmarried girls. That protection would be largely, if not wholly, illusory if in every case it were incumbent on the prosecution to prove that she was taken from her parents for the purpose of intercourse of a kind positively forbidden by some enactment, and not for intercourse not so forbidden. We do not think that such can have been Parliament's intention.

As regards the alternative suggestion that "unlawful" intercourse in section 19 connotes intercourse in a brothel or something of that kind, it is sufficient to observe that to procure a girl to leave her home to become an inmate of or to frequent a brothel, or to become a common prostitute, is made a specific offence by section 22 of the Act, and section 19 is not therefore needed for this purpose.

If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word "unlawful" in section 19 is either surplusage or means "illicit." We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view, the word simply means "illicit," i.e., outside the bond of marriage. In other words, we take the same view as the trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in sections 17 and 18 of the Act, that is, "with the "intent that she shall marry, or have unlawful intercourse . . ."

There was ample evidence in the present case upon which the jury could find that this girl was taken away by the appellant with the intent that he should have intercourse with her, which was unlawful in the sense which we have determined. As leave to appeal was given, however, to argue the point of law involved, the sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; A. N. Schofield, Town Clerk, Southampton.*

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Ex parte BALDWIN & FRANCIS LTD.

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April 29, 30;
May 1, 2.

Jenkins, Parker and Pearce L.JJ.

Crown Practice—Certiorari—Inferior tribunal—Patents Appeal Tribunal—Whether certiorari will lie to tribunal—Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 9, 85 (10).

Patents — Appeal Tribunal — Jurisdiction — Whether amenable to certiorari.

Crown Practice—Certiorari—Error of law on face of record—Construction—Evidence necessary to enable court to construe documents part of record—Whether certiorari applicable.

Evidence—Construction of documents—Extrinsic evidence—Meaning of words—Technical terms.

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Section 85 (10) of the Patents Act, 1949, provides: "An "appeal to the Appeals Tribunal under this Act shall not be "deemed to be a proceeding in the High Court."

A company made application for a patent whereupon, on the publication of its specification, the owners of a prior patent opposed the grant of the patent applied for on the grounds, inter alia, that its specification could not fairly describe the invention or the method by which it was to be performed without referring to their prior patent and that such a reference should be directed under section 9 of the Act. Both the patent applied for and the prior patent concerned improvements designed to prevent the re-closing of an electric circuit in which an earth fault had developed until that fault was repaired.

Subsequently, on investigation by the superintending examiner on behalf of the comptroller, it was decided that the later invention could not be performed without substantial risk of infringement of the prior patent, and, accordingly, there being no proposals for amending its specification, by a final decision dated August 31, 1956, the superintending examiner ordered that the patent applied for be sealed with a reference to the prior patent.

On appeal to the Patents Appeal Tribunal, the tribunal reversed that decision. The owners of the prior patent being dissatisfied with the tribunal's decision, from which there was no appeal, applied for an order of certiorari on the ground that there was an error of law appearing on the face of the record in that the tribunal had misconstrued the rival specifications, or one of them:—

Held, (1) that the decision of the tribunal was that of an inferior tribunal to which an order of certiorari would issue.

Reg. v. *Patents Appeal Tribunal, Ex parte Champion Paper & Fibre Co.* [1957] 1 W.L.R. 248; [1957] 1 All E.R. 227; [1956] R.P.C. 323 approved.

(2) That the specifications formed part of the record.

Reg. v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796 applied.

But (3) that to determine whether the specifications had been misconstrued it was necessary for the court to be informed by evidence to understand the language used therein, and, as on an application for certiorari for error of law as opposed to want of jurisdiction the court could not look at evidence given in the proceedings or receive new evidence on affidavit, the application failed.

Dicta of Parke B. and Tindal C.J. in *Shore* v. *Wilson* (1842) 9 Cl. & F. 355, 555, 566, and of Parke B. in *Neilson* v. *Harford* (1841) 1 Web.P.C. 295, 370, applied.

Decision of the Divisional Court affirmed.

APPEAL from the Divisional Court.

The facts are taken substantially from the judgment of Parker L.J.

This was an appeal from a decision of the Divisional Court (Lord Goddard C.J. and Donovan J.), refusing an application for an order of certiorari to quash an order made by the Patents Appeal Tribunal (Lloyd-Jacob J.) on January 17, 1957. That decision reversed a decision of the superintending examiner made in pursuance of section 9 of the Patents Act, 1949.

On November 23, 1950, the respondents, Anderson Boyes & Co. Ltd., made application for patent No. 703630, and in due course filed and published a complete specification, entitled "Improvements in or relating to protective systems for poly-"phase alternating current loads." Whereas there already existed inventions ensuring that the development of an earth fault in a circuit would automatically break the circuit, the improvement in question was designed to prevent the re-closing of the circuit while the earth fault remained unrepaired. The appellants, Baldwin & Francis Ltd., were owners of a prior patent, No. 658823, the complete specification of which was entitled "Improvements in and relating to earth leakage protec-"tion systems for electric motors, cables and other apparatus." Like the respondents' improvements, the appellants' improvements were designed also to prevent the re-closing of a circuit in which an earth fault had developed until that fault was repaired.

In due course the appellants opposed the grant of the patent applied for, on the ground, inter alia, provided for in section 14 (1) (*g*) of the Patents Act, 1949: "that the complete specifica-"tion does not sufficiently and fairly describe the invention or "the method by which it is to be performed." Their contention was that the specification could not fairly describe the invention or the method by which it was to be performed without referring to the appellants' patent, and that such a reference should be directed under section 9 of the Act.

In due course the matter was investigated by Mr. Vincent, the superintending examiner, on behalf of the comptroller, and by an interim decision dated June 15, 1956, he decided that the invention could not be performed without substantial risk of infringement of the appellants' patent. He allowed one month to enable the respondents to submit proposals for amending the specification. No such proposals were forthcoming, and accordingly the superintending examiner, by a final decision dated August 31, 1956, ordered that the patent applied for be sealed with a reference to the appellants' patent. The present respondents thereupon appealed (as is provided for in the Act) to the Patents Appeal Tribunal, which, on January 17, 1957, gave a

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written decision reversing the decision of the superintending examiner. From that decision of the Patents Appeal Tribunal there could be no further appeal, none being provided for by statute, and the appellants' only remedy, accordingly, was by way of an order of certiorari to quash the decision for an error of law on the face of the record.

The appellants, being dissatisfied with the decision of the tribunal, accordingly applied to the Divisional Court for an order of certiorari. There was no question of lack of jurisdiction, but it was contended before the Divisional Court that there were two errors of law appearing on the face of the record. First, it was said that the tribunal had misconstrued section 9 of the Patents Act, 1949. As to that, the Divisional Court could find no such error; and there was no appeal from that part of the decision. Secondly, it was said that the tribunal had erred in misconstruing the rival specifications, or one of them. As to that, the Divisional Court refused to consider the meaning of the specifications, holding that they were unable to do so without being instructed in the technicalities of electrical engineering.

From this part of the decision the appellants appealed.

J. P. Graham Q.C., *Anthony Cripps Q.C.* and *Mervyn Heald* for the appellants. The case for the appellants can be shortly stated thus: (1) The Patents Appeal Tribunal misconstrued the claim of the prior patent; (2) as a result the tribunal, in effect, found that there could not be any infringement by the later invention; (3) the Court of Appeal should test the matter itself by construing the earlier claim, and (4) to that construction it should apply the facts in respect of apparatus constructed according to the later patent, as found by Mr. Vincent, the superintending examiner; (5) if that is done, the court will find that there is risk of infringement; (6) it follows that the tribunal was in error, such error being an error of construction and of law on the face of the record, and on the authorities that is a proper case for certiorari, the tribunal being an inferior tribunal to which an order of certiorari will issue: see section 85 (10) of the Patents Act, 1949, and *Reg.* v. *Patents Appeal Tribunal, Ex parte Champion Paper and Fibre Co.*[1]

G. W. Tookey Q.C., *S. I. Levy Q.C.* and *John Hall* for the respondents. To succeed the appellants must show that there is an error of law manifest in the decision of the tribunal or on the face of the record: see *per* Denning and Morris L.JJ. in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw.*[2] [Reference was also made to *Davies* v. *Price.*[3]] The majority of cases relating to certiorari concern the interpretation of the provisions of a statute or statutory regulation. That is important, since as regards the provision of a statute or regulation the judges are presumed to know the law and, accordingly, on perusing the provision in question, the court is able to determine whether there has been manifest error in its interpretation. But the present case is totally different from such cases, for the court does not take judicial notice of the contents of patent specifications. The court looks at the document containing the specification to ascertain whether there are any technical words which require elucidation. If an instrument uses technical terms their exact meaning is to be ascertained by the jury on evidence. Thereupon the court, fortified by the findings of the jury, pronounces upon the construction to be placed upon the document: see *per* Parke B. in *Neilson* v. *Harford.*[4]

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[1] [1957] 1 W.L.R. 248.

In the present case the court cannot construe the rival specifications to ascertain whether the tribunal was in error in construing the earlier claim without receiving evidence as to the meaning of the technical terms used in them. But it is established law that on an application for an order of certiorari, which is not one going to jurisdiction, the court cannot look at the evidence given in the proceedings or receive new evidence on affidavit. Further, the appellants are not entitled to rely on the decision of Mr. Vincent, the superintending examiner, because that was under review by the tribunal, and therefore their application is bound to fail. Also, the tribunal's decision is based on questions of fact, not law. [Reference was also made to *In re Dowty's Application.*[5]]

Graham Q.C. in reply. It has been suggested, in effect, that the error complained of was one of fact, not of law. But the primary question is whether there is possibility of infringement, and that involves a question of law. The fact that the case may be a difficult one is not a sufficient ground for the court refusing to determine the question. These specifications form part of the record and the same principles are applicable as would be the case if the error complained of related to the misconstruction of a statute or regulation. [Reference was made to *Rex* v.

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[2] [1952] 1 K.B. 338, 351, 355.

[3] [1958] 1 W.L.R. 434, 440–442.

[4] (1841) 1 Web.P.C. 295, 370.

[5] (1944) 61 R.P.C. 52.

Northumberland Compensation Appeal Tribunal, Ex parte Shaw.[6]]

JENKINS L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. referred to the facts and continued: That an order of certiorari will lie, in a proper case, to quash a decision of that tribunal is, I think, clear. Though the tribunal consists of a judge of the High Court, the Patents Act, 1949, specifically provides, by section 85 (10), that "an appeal to the Appeal "Tribunal under this Act shall not be deemed to be a proceeding "in the High Court." Accordingly, the decision of the tribunal is a decision of an inferior tribunal of a kind to which an order of certiorari will issue; and indeed that was decided by the Divisional Court in *Reg.* v. *Patents Appeal Tribunal, Ex parte Champion Paper and Fibre Co.*[1]

Mr. Graham, on behalf of the appellants, puts his contention in this way. Before the tribunal can decide whether there is a substantial risk of infringement, it must construe the rival specifications. The construction of a written document is a matter of law. Reading the decision of the tribunal (so he says) it is clear that the tribunal must have misconstrued the specifications, and accordingly there is an error of law on the face of the record.

It is clear that proceedings such as these are in no sense by way of appeal. The court can look, and look only, at the reasoned decision, and at such other documents as can fairly be said to form part of the record. If no reasoned decision is given, the error of law, if error there be, will not be detected. The face of the record (as Lord Sumner put it in *Rex* v. *Nat Bell Liquors Ltd.*[2]) was then "the inscrutable face of a sphinx." In the ordinary case, where, as here, what is called a "speaking order" is made, the error, if error there be, takes the form of the misconstruction or misapplication of a statute or regulation. This case, so far as I know, is the first case where it is said that the error consists of the misconstruction of some other document. Logically, however, if that document does form part of the record and the decision on its face shows that the tribunal has misconstrued it, I do not see why certiorari will not lie. It is an error of law, albeit one different from that sometimes found.

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[6] [1951] 1 K.B. 711, 724.

[1] [1957] 1 W.L.R. 248; [1957] 1 All E.R. 227; [1956] R.P.C. 323.

[2] [1922] 2 A.C. 128, 159; 38 T.L.R. 541.

The first question, therefore, is whether these specifications form part of the record. As regards the appellants' specification, an extract of this is set out in the tribunal's decision, and, following the decision of this court in *Regina* v. *Medical Appeal Tribunal, Ex parte Gilmore*,[3] I think that the effect of this is to make the whole specification part of the record. As regards the respondents' specification, it is true that specific extracts are not set out, but it is their application (as the title to the decision shows) which is the document initiating the proceedings, and, looked at in that way, again I should have thought formed part of the record. Indeed, Denning L.J., in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[4] said: "It "appears that the Court of King's Bench always insisted that "the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal "its jurisdiction." Accordingly, in my judgment both these documents (as Mr. Graham contends) form part of the record. Whether (as he also contends) the decision of the superintending examiner forms part of the record I find it unnecessary (for reasons which will appear hereafter) to determine.

So far, therefore, I agree with Mr. Graham's argument. But the next question is whether either of these documents has been misconstrued. This, of course, means that the court must itself decide what the right construction is. The documents in this case, by their very nature, are dealing with technical matters of science, and technical terms are used. Where technical words are used in a document, prima facie they are used in their technical sense; and, where the words are technical words of science as opposed to technical legal terms, evidence of experts or of books dealing with the subject is admissible, to inform the court of their meaning. Thus, when the language of the instrument is such that the court does not understand, it is competent to receive evidence of the proper meaning of that language, and this is so whether it is written (for instance) in a foreign tongue or contains technical terms of science or art.

I need only refer to two passages in *Shore* v. *Wilson*.[5] The first passage is from the judgment of Parke B., where he said[6]: "This being assumed, as a matter which cannot be controverted, "I apprehend that there are two descriptions of evidence (the

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[3] [1957] 1 Q.B. 574; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796.

[4] [1952] 1 K.B. 338, 352; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[5] (1842) 9 Cl. & F. 355.

[6] Ibid. 555.

"only two which bear upon the subject of the present inquiry), "and which are clearly admissible in every case for the purpose "of enabling a court to construe any written instrument, and to "apply it practically. In the first place, there is no doubt that "not only where the language of the instrument is such as the "court does not understand, it is competent to receive evidence "of the proper meaning of that language, as when it is written "in a foreign tongue; but it is also competent, where technical "words or peculiar terms, or indeed any expressions are used, "which at the time the instrument was written had acquired an "appropriate meaning, either generally or by local usage, or "amongst particular classes."

Tindal C.J. said [7]: "Such investigation does of necessity take "place in the interpretation of instruments written in a foreign "language; in the case of ancient instruments, where, by the "lapse of time and change of manners, the words have acquired "in the present age a different meaning from that which they "bore when originally employed; in cases where terms of art or "science occur; in mercantile contracts, which in many instances "use a peculiar language employed by those only who are con-"versant in trade and commerce; and in other instances in "which the words, besides their general common meaning, have "acquired, by custom or otherwise, a well-known peculiar "idiomatic meaning in the particular country in which the party "using them was dwelling, or in the particular society of which "he formed a member, and in which he passed his life. In all "these cases evidence is admitted to expound the real meaning "of the language used in the instrument, in order to enable the "court or judge to construe the instrument, and to carry such "real meaning into effect. But whilst evidence is admissible in "these instances for the purpose of making the written instru-"ment speak for itself, which without such evidence would be "either a dead letter, or would use a doubtful tongue, or convey "a false impression of the meaning of the party, I conceive the "exception to be strictly limited to cases of the description above "given."

Of course, those judgments were dealing with the admissibility of evidence, but in my judgment not only is the court competent to receive such evidence, but it must do so, to understand the language used. One judge may, by reason of his training or by reason of experience, have more knowledge of technical terms

[7] 9 Cl. & F. 566–567.

of science than another, but both must inform themselves by evidence of the meaning of the language used—unless the matter involved is one of which judicial notice can be taken. Without in any way seeking to limit the matters of which judicial notice may be taken, I am quite clear that in the present case the court must be informed by evidence, be it only the evidence derived from books dealing with the matter. A case might, of course, arise (as Jenkins L.J. mentioned in argument) where the two rival specifications are expressed in identical language. In such a case, infringement must arise, whatever the construction. But in a case, as here, where similar improvements are the subject of rival specifications expressed in different words, the exact meaning of the technical words used must be a matter of evidence. To take an example in the present case: the appellants' specification uses the expression "current injected . . . "by means of a . . . resistance." It is clear, in my view, that evidence is necessary, and indeed as I understand it evidence was given in the proceedings, as to the exact meaning and implication of that expression. One can perhaps test the matter by imagining that these were infringement proceedings tried by a judge and jury. In that case it is clear that, while the construction of the documents would be for the judge, it would be for the jury to determine on the evidence the exact meaning of the terms used. Thus, in *Neilson* v. *Harford* [8] Parke B. said: "Then we "come to the question itself, which depends on the proper con- "struction to be put on the specification itself. It was contended, "that of this construction the jury were to judge. We are "clearly of a different opinion. The construction of all written "instruments belongs to the court alone, whose duty it is to "construe all written instruments, as soon as the true meaning "of the words in which they are couched, and the surrounding "circumstances, if any, have been ascertained by the jury; and "it is the duty of the jury to take the construction from the "court, either absolutely, if there be no words to be construed as "words of art, or phrases used in commerce, and the surrounding "circumstances to be ascertained, or conditionally, where those "words or circumstances are necessarily referred to them."

Accordingly, I am satisfied that we cannot construe the specifications without being informed by evidence, and, that being so, the application for an order of certiorari must fail in limine. On such an application, not being one going to jurisdiction, this court cannot look at the evidence given in the proceedings or receive new evidence on affidavit.

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[8] (1841) 1 Web.P.C. 295, 370.

In these circumstances, I find it unnecessary to consider further the specifications, the decision of the superintending examiner, or the decision of the tribunal itself.

In my judgment, the Divisional Court were right, and this appeal should be dismissed.

PEARCE L.J. I agree.

JENKINS L.J. I also agree.

Appeal dismissed.
Leave to appeal refused.

Solicitors: *Parker, Garrett & Co. for Benson, Burdekin & Co., Sheffield; Bristows, Cooke & Carpmael.*

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Lord Evershed M.R., Sellers and Pearce L.JJ.

BAKER *v.* SIMS.

[Plaint No. 2915.]

Landlord and Tenant—Repairs—Act of 1938*—Effect of counter-notice claiming benefit—Subsequent proceedings by lessor for breach of repairing covenant—More than five years of term not then unexpired—Whether Act applicable—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146*—Leasehold Property* (*Repairs*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1.

The plaintiffs were the landlords of premises let for a term of 99 years less seven days expiring on December 18, 1959. In 1953 the landlords served on the defendant, in whom the lease was then vested, a notice under section 146 of the Law of Property Act, 1925,[1] alleging breaches of the repairing covenants in the lease. The defendant served a counter-notice pursuant to the Leasehold Property (Repairs) Act, 1938,[2] claiming the benefit of that Act. In 1954 the defendant assigned the lease to a company and it was subsequently surrendered. These proceedings were started in 1957 by the landlords against the defendant for damages for breaches of the repairing covenants of the lease. The preliminary point was taken that the action was incompetent because the leave of the court under section 1 (3) of the Act of 1938 was a prerequisite to the jurisdiction of the court:—

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[1] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or forfeiture under any proviso or stipulations in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—(a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

Held, that effect could not be given to the purpose of section 1 of the Leasehold Property (Repairs) Act, 1938, unless a limitation was read into subsection (3) to make it consistent with subsections (1) and (2), and that in subsection (3) the provision that "no "proceedings shall be taken" by the lessor for breach of covenant or for damages for breach thereof must be read as "no proceedings "contemplated in the preceding subsections shall be taken" and, accordingly, that the leave of the court was only required where more than five years of the term remained unexpired.

Observations of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88 applied.

Kanda v. *Church Commissioners for England* [1958] 1 Q.B. 332; [1957] 2 All E.R. 815 and *Cusack-Smith* v. *Gold* [1958] 1 W.L.R. 611; [1958] 2 All E.R. 361 considered.

APPEAL from Judge Sir Shirley Worthington Evans sitting at Clerkenwell County Court.

The plaintiffs, Elsie Ambler Baker and Harry Noel Venner, were the trustees of the will of Elisha Ambler, and in that capacity were lessees of 4, Mitchison Road, Islington. Elisha Ambler had by a lease dated May 9, 1862, subdemised those premises for a term of 99 years less seven days from December 25, 1860, at an annual rent of £5. This sublease contained a common-form covenant to keep the premises in repair. That sublease was on August 27, 1931, assigned to the defendant, William Joseph George Sims. In April, 1953, more than five years before the end of the term, the plaintiffs had served a notice of want of repair on the defendant under section 146 of the Law of Property Act, 1925, and on May 5, 1953, the defendant served a counter-notice on the plaintiffs under section 1 of the Leasehold Property (Repairs) Act, 1938. On February 22, 1954, the defendant assigned his sublease to Alsen Properties Ltd. On December 5, 1955, that company surrendered the sublease to the plaintiffs.

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[2] Leasehold Property (Repairs) Act, 1938, s. 1: "(1) Where a lessor "serves on a lessee under subsection "(1) of section 146 of the Law of "Property Act, 1925, a notice that "relates to a breach of a covenant . . . "to keep or put in repair . . . and at "the date of the service of the notice "five years or more of the term of "the lease remain unexpired, the "lessee may within 28 days from that "date serve on the lessor a counter-"notice to the effect that he claims "the benefit of this Act. (2) A right "to damages for a breach of such a "covenant as aforesaid shall not be "enforceable by action commenced at "any time at which five years or "more of the term of the lease "remain unexpired unless the lessor "has served on the lessee not less "than one month before the com-"mencement of the action such a "notice as is specified in subsection "(1) of section 146 of the Law of "Property Act, 1925, and where a "notice is served under this subsec-"tion, the lessee may within 28 days "from the date of the service thereof, "serve on the lessor a counter-notice "to the effect that he claims the "benefit of this Act. (3) Where a "counter-notice is served by a "lessee under this section, then, not-"withstanding anything in any enact-"ment or rule of law, no proceedings, "by action or otherwise, shall be "taken by the lessor . . . for "damages for breach thereof, other-"wise than with the leave of the "court. . . . (5) Leave for the pur-"poses of this section shall not be "given unless the lessor proves . . . "[etc.]. (6) The court may, in grant-"ing or in refusing leave for the pur-"poses of this section, impose such "terms and conditions on the lessor "or on the lessee as it may think fit."

In these proceedings the plaintiffs claimed £249 damages from the defendant on the ground that, while he was their sublessee, he had failed to keep the premises in repair. In his defence the defendant did not admit the dilapidations and he alleged that the plaintiffs had not obtained leave from the court under section 1 (3) of the Act of 1938. Alsen Properties Ltd. was brought in as third party.

The preliminary point of law was tried: whether the court had jurisdiction to hear the action, having regard to the fact that the plaintiffs had not first obtained the leave of the court to bring this action pursuant to the provisions of section 1 (3) of the Act of 1938. The plaintiffs contended that subsection (3) of section 1 did not apply where proceedings were brought within five years of the end of the term. The county court judge held that, since the plaintiffs had not obtained leave, the action was not maintainable and he entered a non-suit.

The plaintiffs appealed. The third party was not represented in the appeal.

B. C. Sheen for the plaintiffs. The question is whether leave to proceed has to be obtained under subsection (3) of section 1 of the Leasehold Property (Repairs) Act, 1938, when a tenant's lease has been surrendered or when less than five years of the term remains unexpired. The county court judge non-suited the plaintiffs on the ground that leave to proceed had not been obtained. The plaintiffs are claiming damages in respect of a later period than that to which the notice of want of repair, served in 1953 under section 146 of the Law of Property Act, 1925, related. Subsection (3) of section 1 is subject to the five-year limitation which is to be found in subsections (1) and (2). The only decision directly in point is *Dwellings Developments Ltd.* v. *Drake*,[3] a decision of the official referee, who reached a contrary conclusion to that of the county court judge. In *Kanda* v. *Church Commissioners for England*[4] the observations of Morris L.J.,[5] which were obiter, support the plaintiffs' contention; as does the decision of Pilcher J. in *Cusack-Smith* v. *Gold*.[6] The judge there held that leave to proceed was not necessary against a person who, since the service of a notice under section 146 of the Act of 1925, had ceased to be a tenant. He held that a person who was not a tenant was not entitled to the benefit of section 1 (3) of the Act of 1938. [Reference was made to Foa's Law of Landlord and Tenant, 8th ed., p. 223, para. 356.]

If the construction which the county court judge put on section 1 (3) is right, the consequences would be startling. First, the subsection would apply when a notice of disrepair had been served 20 years before and by a predecessor in title of the landlord, and, maybe, on a predecessor of the tenant, and it would prevent the then landlord within five years of the expiration of the term or after the expiration of the term bringing an action against the then tenant without leave. Secondly, when the term had expired, an application for leave would be absurd, since the judge would not have any discretion to refuse leave. Alternatively, it would be absurd that a judge should have a discretion to refuse leave to proceed when there was a vested right to damages at common law. Thirdly, it appears from subsection (5) of section 1 that the grounds on which the court may grant leave to proceed are only consistent with the view that the protection being conferred is intended to be confined to a tenant in possession. Fourthly, the section would operate capriciously if leave to proceed were required within five years of the determination of the term when a notice had been served under section 146 before that period but not where no such notice had been served. Lastly, a judgment which a landlord had obtained would be liable to be set aside were it subsequently discovered that in some earlier period, however remote, a notice under section 146 had in fact been served.

Section 1 must be read as a whole and so as to give effect to its purpose, which is to protect tenants. There can be no tenant to be protected when his tenancy is at an end. A statute should

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[3] (1954) 163 E.G. 192.

[4] [1958] 1 Q.B. 332; [1957] 2 All E.R. 815.

[5] [1958] 1 Q.B. 332, 343.

[6] [1958] 1 W.L.R. 611; [1958] 2 All E.R. 361.

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not be construed so as to produce absurdities. [Reference was made to *Bagettes Ltd.* v. *G. P. Estates Ltd.*,[7] *In re Lockwood*[8] and *Attorney-General* v. *Prince Ernest Augustus of Hanover.*[9]] Since the section imposes a restriction on a common law right of action, it should be narrowly construed.

F. Petre for the defendant. With regard to the facts: the dilapidations referred to in the notice of dilapidations of 1953 are in fact the same as those alleged in this action for which damages are claimed; it is, however, agreed that between the service of the notice and the date of the assignment of the lease there must have been some change in the state of the premises. Section 1 (3) is unambiguous in its terms. It says: "no proceedings by action "or otherwise shall be taken" without the leave of the court where a counter-notice has been served. Subsection (3) deals with the effect of a counter-notice served under subsections (1) or (2). Because subsection (3) follows the two preceding subsections, it does not mean that it owes allegiance to them. It is a section on its own. It must be interpreted in the light of the language which has been used. It is not permissible to insert words in the section. With regard to the argument that if subsection (3) is construed literally it will result in an absurdity, it is submitted that the results of a literal interpretation are not absurd, but in some cases they may result in hardship. That in itself does not entitle the court to do violence to the language used. If a plaintiff ought to be given leave to proceed, he will have no difficulty in obtaining it. Subsections (5) and (6) of section 1 on their true construction do not presuppose that there must be a lessee in possession for subsection (3) to apply.

The decision of the official referee in *Dwellings Developments Ltd.* v. *Drake*[10] is not binding on this court. Reference was also made by the appellants to *Kanda* v. *Church Commissioners for England*[11] and *Cusack-Smith* v. *Gold.*[12] Neither decision is helpful. The latter shows that if a counter-notice is served by one of several defendants it enures for the benefit of all of them and leave to proceed must be obtained. [Reference was made to Maxwell on the Interpretation of Statutes, 10th ed., pp. 3, 12, *Tinkham* v. *Perry*[13] and *Donovan* v. *Cammell Laird & Co.*

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[7] [1956] Ch. 75; [1955] 3 All E.R. 451.

[8] [1958] Ch. 231; [1957] 3 All E.R. 520.

[9] [1957] A.C. 436; [1957] 1 All E.R. 49.

[10] 163 E.G. 192.

[11] [1958] 1 Q.B. 332.

[12] [1958] 1 W.L.R. 611.

[13] [1951] 1 K.B. 547; [1951] 1 T.L.R. 91; [1951] 1 All E.R. 249.

Ltd.[14]] Where the words of a statute are absolutely plain, and the language of subsection (3) is plain, the statute must be applied according to its terms. No omission should be made good by the court if the words are clear.

Sheen in reply. It appears from Maxwell on the Interpretation of Statutes, 10th ed., p. 229, that a statute must be so construed as to give effect to its object and intent, and here the court should so construe subsection (3) as to limit its operation to cases where subsection (1) or (2) applies. That must have been the intention.

LORD EVERSHED M.R. This appeal has raised a question of exceptional difficulty on the construction of the Leasehold Property (Repairs) Act, 1938.

The plaintiffs (who are appellants in this court) are the lessees of 4, Mitchison Road, Islington, under a lease for 99 years from December 25, 1860. An underlease had been granted of that term less the last seven days, which at the relevant date was vested in the defendant (respondent). The underlease would have expired on December 18, 1959, in any event; but it has in fact been surrendered.

The defendant acquired his interest in 1931; and in 1952 the plaintiffs took the view that there had been, and were continuing to be, breaches of the covenant for repair—which is in usual form, in a full repairing lease. A schedule of alleged breaches was prepared, and served on the defendant in April, 1953, with a notice pursuant to the Act of 1938. The defendant in the following month served a counter-notice under the same Act. Nothing, however, then transpired; no proceedings were taken; but in the following year, 1954, the defendant in fact assigned the unexpired remainder of his term under the sublease to a limited company, Alsen Properties Ltd., who were joined as third parties in these proceedings but who are not parties to this appeal. That third party, in December, 1955 (some four years, therefore, before the expiration by effluxion of time of the sublease), surrendered the term to the plaintiffs, and that surrender was accepted. In November of 1957 the present proceedings were commenced by way of a claim by the plaintiffs against the defendant for damages for breaches of the repairing covenant which, it was alleged, had been committed during the time that the defendant was the sublessee.

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[14] [1949] 2 All E.R. 82; 82 Ll.L.Rep. 642.

The defendant brought in as third parties the Alsen company; but they are not concerned with this appeal.

When the matter came before Judge Sir Shirley Worthington Evans in the county court, the point was taken on behalf of the defendant that the action was incompetent, because the leave of the court to the commencement of the proceedings was a prerequisite for the jurisdiction of the court. Admittedly no leave had been asked for or obtained. Whether leave was required is the question which we now have to determine; and it turns particularly on the language of section 1 (3) of the Act of 1938. The county court judge came to the conclusion that the point taken by the defendant was well taken; that, in default of leave having been obtained, there was no right to sue; and he therefore dismissed the claim. It is from that decision, upon what was treated as a preliminary question of law, that the appeal comes to this court.

The argument (very briefly put) is, that, if you look at subsection (3) upon its own terms, with your mind unaffected and unbiassed by anything which you think is to be discerned from the other subsections in the same section, then the result is plain enough: it is, that, once a counter-notice has been served (and those last words I take from Mr. Petre's argument), then there is an absolute bar against proceedings of this kind without leave of the court.

In order to answer the problem it is necessary to have some regard to history; for one cannot (and so much Mr. Petre conceded) properly construe a particular paragraph in an Act of Parliament without at least having in one's mind the relevant context in which it appears. For present purposes, I must go back to the Law of Property Act, 1925, to make a reference to section 146, the well-known section which imposed a restriction on a landlord's right to forfeit or re-enter for breach of covenant. That, of course, was not novel. Section 146 was a re-enactment (though not in quite the same terms) of the previous restriction which appeared in the Conveyancing Act of 1881. Subsection (1) provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of any covenant is not enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the breach requiring remedy, if it is capable of remedy, and requiring the lessee to make money compensation. Observe that the restriction is one related only to re-entry or forfeiture but it is not limited to the particular breach of covenant on which the claim may be founded.

The Leasehold Property (Repairs) Act, 1938, picks up, so to speak, the matter from section 146, and confers a new benefit upon lessees, going beyond that given by section 146 but nevertheless (as will, I think, appear) in some respects at any rate, plainly enough, limited. Subsection (1) of section 1 of the Act of 1938 reads as follows: [His Lordship read subsection (1) and continued:]

Observe at this point that the effect of subsection (1) (briefly) is, first, that it is limited to cases where the section 146 notice is founded upon a breach of a repairing covenant: second, that it is limited to the case of a long term lease, where the house is of a small rateable value " and " (this being the vital point for present purposes) " at the date of the service of the notice " five years or more of the term of the lease remain unexpired " —given those conditions, then, if the section 146 notice is served (as it would have to be served), the lessee is given a right to serve a counter-notice claiming " the benefit of the Act."

Subsection (2) takes the matter a stage further and gives to the lessee a further right. That subsection no longer is confined to the case of the lessor seeking forfeiture or re-entry, but relates to a claim for damages—but again, a claim for damages only where the breach alleged is a breach of a repairing covenant; and once again you find this limitation that there must be, if the lessee is to have this right to claim the benefit of the Act, five years or more of his term unexpired. [His Lordship read subsection (2) and continued:]

In order to dispose of it at this stage, it is right to say that those provisions have been amended (in the lessee's favour) by section 51 (1) of the Landlord and Tenant Act, 1954, which provides: " The Leasehold Property (Repairs) Act, 1938 (which " restricts the enforcement of repairing covenants in long leases " of small houses) shall extend to every tenancy (whether of " a house or of other property, and without regard to rateable " value) where the following conditions are fulfilled, that is to " say " (and (*a*) relates to the length of the term of the tenancy) " . . . (*b*) that three years or more of the term remain unexpired " at the date of the service of the notice of dilapidations or, as " the case may be, at the date of commencement of the action " for damages "; and then (*c*) excludes agricultural holdings.

The amending provision has no relevance to this particular case and I therefore shall proceed by assuming that the conditions as they were laid down in section 1 (1) and (2) of the Act of 1938 are the relevant conditions.

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No question turns upon the rateable value of the house; but the vital matter again is that subsections (1) and (2) contemplate a restriction where (putting it briefly) five years or more of the term—the lessee's interest—remain unexpired.

So far it will be noted that the two subsections have conferred, in the circumstances, and the plainly limited circumstances, stated, a right on a lessee to claim "the benefit of this "Act." We have not been told yet what "the benefit" of the Act exactly is; but at this stage I find it useful to interpolate a reference to language used by Goddard L.J. in a case under this Act which came before the court in 1939: *National Real Estate and Finance Co. Ltd.* v. *Hassan.*[1] I refer to the judgment because the Lord Justice stated (and in my respectful view correctly stated) what the mischief was that the Act of 1938 was designed to remedy. The Lord Justice said[2]: "The "mischief it was designed to remedy was speculators buying up "small property in an indifferent state of repair, and then serving "schedule of dilapidations upon the tenants, which the tenants "cannot comply with. I am not saying that was this case, but "this is general mischief, that the speculator buys at a very low "price, turns out the tenants, and gets the reversion which "he has never paid for, which is a great hardship to the "tenants."

That passage makes quite clear the significance of the five-year period—a significance which, to my mind, is reinforced when you come to the later subsections. But so far, if Goddard L.J.'s view is right (and I take it to be entirely right), then "the benefit" which the Act confers is plainly to be anticipated as something to protect the tenant of a small house where the tenant has a long-term lease of which at any rate five years still remain to run: the landlord is not to be able, by exercising the rights of forfeiture or damages, to get for nothing (in effect) the reversion five years before it falls in.

I now come to the vital subsection (3). [His Lordship read subsection (3) and continued:]

The argument which found favour with his Honour, and which Mr. Petre has put before us with very great force, is this: If you read that subsection, the words of themselves, unilluminated (or, as he would say, undeflected) by anything which has gone before or will follow after, there is the benefit quite plainly stated—and again I revert to Mr. Petre's own words: once a counter-notice has been served then no action or proceeding to enforce, by way of forfeiture or claim for damages, the alleged breach of a repairing covenant, can be taken by the landlord, save with the leave of the court.

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[1] [1939] 2 K.B. 61; 55 T.L.R. 570; [1939] 2 All E.R. 154.

[2] [1939] 2 K.B. 61, 78.

In 1953 a counter-notice was in fact served by the defendant upon the plaintiffs; and so (Mr. Petre says; and the county court judge held) that puts a complete stop on the plaintiffs' right to sue for damages for breach of the repairing covenant; even though, when they bring their action, not only is there less than five years of the lease to run but (as has happened in this case) the lease has ceased to exist altogether by virtue of surrender. If that view is right, it is again conceded by Mr. Petre that the results are far-reaching—and he admitted that they might, in certain circumstances, be remarkable, and indeed impose a real hardship upon a landlord. I will take, of the examples which Mr. Sheen put before us, one, to illustrate the point. Let it be supposed that, in the latter part of the year 1938, when the Act of 1938 had come into force, a notice of dilapidations was served upon the tenant. Let it be supposed that the tenant then served a counter-notice; but, good relations prevailing, let it be supposed that what was complained of was then put right, to the satisfaction of the landlord—that no proceedings were ever taken—and that there the matter remained for 20 years. Then in 1958—when (assuming no surrender) a year remains to go—serious damage is discovered to have been done to a wall or to the roof, since 1938. What is the right of the landlord? If Mr. Petre is right, he must then proceed to get the leave of the court—not, I understand, requiring any fresh service of any notices or anything of that kind, since, once a counter-notice has been served, the restriction is there: he (the landlord) must go to the court and get leave to bring the proceedings, though only a year remains of the lease. If that is right, it is quite plain that the restriction is one which is quite different from anything which you would suppose, from the reading of subsections (1) and (2), was going to follow: the five-year limit has ceased to have any relevance: and yet (as Goddard L.J. pointed out) the remedy designed for the mischief was to protect the lessee from the lessor who sought, while there was still a substantial period of time left to the lessee under his term, to try (in effect) to get the benefit of the reversion. In other words, if that view is right, it is plain that the benefit—the privilege—conferred by subsection (3) is something much more far-reaching than, and quite distinct from, anything contemplated or adumbrated by subsection (1) and subsection (2).

But the county court judge felt compelled to hold that that was the result. He drew attention in his judgment to the point that the words in the subsection are "Where a counter-notice "is served," and not (as it was contended the words would more naturally have been if such a wide and far-reaching restriction was intended) "Once a counter-notice has been served." But he concluded that the words of subsection (3) were too compelling to allow him, by some interpolation, by some gloss upon the language, to make subsection (3) fit more closely with subsection (2) by injecting into subsection (3), by some means, the five-year period.

The view which the judge took is in fact at variance with the view which had been taken on exactly the same point by the official referee, His Honour Brett Cloutman, in *Dwellings Developments Ltd.* v. *Drake*.[3] Unfortunately, the county court judge did not have the advantage of seeing that case. The official referee, in the report of his judgment, is recorded as saying this: "The defendant's argument" (which was the argument of the defendant here) "would indeed be formidable if sub-"section (3) were read in isolation, but if section 1 is read as a "whole, the difficulty and the strange conclusion to which this "argument lead both disappear. Reading subsections (2) and (3) "together, it is, I think, plain that the proceedings by action "or otherwise in subsection (3) (restricted to cases where the "leave of the court has been obtained) are to be defined and "limited in the same way as the action which is restricted in "subsection (2) (that is, cases where a notice under section 146 "of the Law of Property Act, 1925, is to be served). In each case "the action restricted is one commenced at any time at which "five years or more of the term remain unexpired. I do not "think that actions within the five-year period are affected, nor "are actions commenced after the expiration of the term. To "hold otherwise would not further the general purposes of the "Act, and, on the other hand, would seem to result both in "injustice and, as I think, absurdity." Whether it is necessary to go the length of using the word "absurdity" is, perhaps, another matter; but on the general view which the official referee expressed I have come to the conclusion, on the whole, that I agree with him.

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[3] (1954) 163 E.G. 192, 193.

I have referred to the proleptic phrase "the benefit of the "Act" in subsections (1) and (2). I have referred to the language of Goddard L.J. stating the mischief which this Act was designed to remedy. I would add at this point one further matter which has struck me a little forcibly. It will be recalled that subsection (3) says: "Where a counter-notice is served by a lessee "under this section, then, notwithstanding anything in any enact- "ment or rule of law. . . ." It would appear that, if the argument for the defendant here is right, then "any enactment" referred to would have to include, or should safely include, subsections (1) and (2); because subsections (1) and (2) plainly are limited to cases where five years of the term still remain to run; and it would be very strange, and, as I think, inconsistent, if subsection (3) is to be read so independently as, by its express terms, to exclude something which is contained or necessarily implied in the immediately preceding subsections in the same section.

But that is not quite all. I can leave out subsection (4), which relates to form rather than substance, and pass to subsection (5) of the same section: "Leave for the purposes of this section"— not, be it observed, "for the purposes of subsection (3) of this "section," but "for the purposes of this section"—"shall not "be given unless the lessor proves (*a*) that the immediate "remedying of the breach in question is requisite for preventing "substantial diminution in the value of his reversion" (etc.); "(*b*) that the immediate remedying of the breach is required for "giving effect in relation to the house to the purposes of any "enactment, or of any byelaw" and similar matters; "(*c*) in a "case in which the lessee is not in occupation of the whole of the "house, that the immediate remedying of the breach is required "in the interests of the occupier . . . (*d*) that the breach can be "immediately remedied at an expense that is relatively small in "comparison with the much greater expense that would probably "be occasioned by postponement" and so on; and then (*e*), "special circumstances which, in the opinion of the court, render "it just and equitable that leave should be given."

It will be noticed that every one of the paragraphs (*a*) to (*d*) inclusive is emphasizing the point which I would put in the form of a question: Is the immediate remedying of this breach really called for in the proper interests of the reversioner? Not one of those paragraphs would have—obviously—the slightest significance or application save where an appreciable period of the term remained unexpired; and could obviously have no possible significance where the term had been altogether surrendered. It is true that paragraph (*e*) is in perfectly general terms—" special " circumstances which in the opinion of the court, render it just " and equitable . . ." But, having regard to the purposes of the Act, I must confess that I cannot see how the landlord, in a case such as this, could really apply himself to proving " special " circumstances " which would " render it just and equitable." Having regard to the general scope of the Act, where the lease is expired I should have thought that the court, if applied to, would be bound to give leave: the question of " special circumstances " could not, I venture to think, arise at all. And if that is right, it seems to me to follow quite plainly that subsection (5) is drawn on the unmistakable assumption or premise that leave will be asked for and is only requisite in cases where an appreciable part of the term of the lease remains unexpired. In other words, it is consistent, and really only consistent, with the view that the restriction is the one adumbrated by subsections (1) and (2) of the section, namely, a restriction where five years or more of the lease remain unexpired.

A little further support, I think, is given to that by subsection (6): " The court may, in granting or in refusing leave for the pur- " poses of this section, impose such terms and conditions on the " lessor or on the lessee as it may think fit "—a formula quite inapplicable to a case such as the present.

Finally, I would briefly refer to section 2, which restricts the right of the lessor to recover expenses which he had a right to recover under section 146 of the Law of Property Act, and which uses the phrase " unless he makes an application for leave for " the purposes of the preceding section "—again not, be it noted, " for the purposes of subsection (3) of the preceding section." The point is, no doubt, a small one, but it lends, I think, some force to Mr. Sheen's argument that you cannot properly interpret section 1 in such a way as would make subsection (3) confer an altogether independent right on the lessee—independent, that is, of the restrictions adumbrated plainly enough by subsections (1) and (2).

In the light of all those circumstances, I have felt compelled to the view that to interpret subsection (3), in the sense which found favour with the county court judge, is really to misinterpret the parliamentary intention as found in the section read as a whole.

We had our attention drawn to a number of passages in Maxwell on the Interpretation of Statutes, and to a number of cases. It is not in doubt that you will find support for many propositions on the interpretation of statutes—not always consistent with each other—in the books; and particularly in Maxwell. But without in any way qualifying the general rule that the court's duty is to interpret the parliamentary language and not to substitute for it what the court may feel would have been a much better idea, it is, I think, legitimate and proper to read and rely upon such a principle as this: "Where the language of a statute" (I am reading from p. 229 of the tenth edition) "in its ordinary meaning "and grammatical construction, leads to a manifest contradiction "of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not "intended, a construction may be put upon it which modifies the "meaning of the words, and even the structure of the sentence." Lord Dunedin, in *Whitney* v. *Inland Revenue Commissioners*,[4] said: "A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless "crucial omission or clear direction makes that end unattainable."

I have come to the conclusion here that you cannot give effect to what I regard as the manifest purpose of this Act, dealing with a particular mischief, unless you do read into subsection (3) the requisite limitation to make it consistent with subsections (1) and (2). Mr. Petre forcefully said: "It is all very well, but what are "the words you are going to read in?"; and that argument must be met. I think the answer is that the words "no proceedings," in the context, and following, as they do, the reference to a "counter-notice served under this section," must be treated as meaning "no relevant proceedings," or "no such proceedings"; or, put in another way, that "no proceedings . . . shall be taken" ought to be read as meaning "the proceedings contemplated in "the preceding subsections of this section shall not be taken." I do not shrink from the fact that my conclusion involves no doubt an appreciable and substantial gloss upon the strict terms of the subsection. But it is only by so interpreting them that I can achieve the consistency in the subsection which a reading of the whole section seems to me inevitably to demand. And I am comforted to this extent: such a reading of the section cannot be condemned as wholly irrational. In the case, which came before this court, of *Kanda* v. *Church Commissioners for England*[5]

[4] [1926] A.C. 37, 52; 42 T.L.R. 58; 10 T.C. 88.

[5] [1958] 1 Q.B. 332; [1957] 2 All E.R. 815.

Morris L.J. used this language in reference to this section[6]: "There might, however, be circumstances under which an assignee "who had gone into possession had proceeded at once to remedy "all disrepair and to bring it about that the premises were in a "condition that satisfactorily complied with the covenants of a "lease. It might be, therefore (and it is to be remembered that "the provisions now under consideration only apply where more "than three years of the term of a lease remain unexpired), that "a court would not necessarily be disposed to give leave to take "proceedings against an assignee." That was a case in which the question was raised whether a judgment should be set aside because leave had not been given as against a particular party. It is, however, true to say that the particular point with which we are concerned was never debated. My brother Pearce, who was then sitting with Morris L.J., has told us quite plainly that the matter never was in their minds at all. I only, therefore, refer to that passage in support of what I have said—that you cannot condemn as irrational, or on the face of it wrong, a reading of subsection (3) in the sense in which I would interpret it, which happens to be the way in which Morris L.J. read the whole section. And Morris L.J. is not, after all, entirely alone. I have earlier read subsection (1) of section 51 of the Landlord and Tenant Act, 1954; and it will be remembered that one of the conditions, (*b*), is expressed thus, that "three years or more of the term "remain unexpired at the date of the service of the notice of dilapidations or, as the case may be, at the date of commencement of "the action for damages"—showing plainly enough that Parliament interpreted section 1 of the Act of 1938—including subsection (3)—as only applicable in the class of case in which Morris L.J. thought it only applicable, namely, where five years or more of the term remain unexpired.

I again wish to protect myself by observing that I am fully aware that if an earlier Act leads to a plain result, or a result which the court thinks is in accordance with the proper interpretation of its terms, then you cannot twist them because Parliament later thought they meant something else. But where there is a fair ambiguity it is, on the other hand, permissible (if it is otherwise justifiable) to prefer a meaning which was the meaning that Parliament later attributed to the language in another Act in pari materia.

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[6] [1958] 1 Q.B. 332, 343.

For these reasons, therefore, I have come to the conclusion, with all respect to his Honour, that in this case the objection taken was not well-founded, and that no leave of the court was required for this particular proceeding.

Before I leave the case I ought to refer to *Cusack-Smith* v. *Gold.*[7] That was an action before Pilcher J. of a somewhat complicated kind. The substance of it was an action for damages for breach of a repairing covenant; and the plaintiff had got before the court no less than 10 defendants. The tenth defendant was one who had a limited interest as a sublessee at the time when a notice on the landlord's part under section 146 and pursuant to subsection (2) of section 1 of the Act of 1938 was served. The tenth defendant was not directly served, but the notice was apparently pinned to the premises, and the judge held that that operated as service upon the tenth defendant. He (the tenth defendant) did not himself serve a counter-notice; but the ninth defendant—a limited company on whom the landlord's notice was directly served—had served a counter-notice. By the time that the action was commenced the tenth defendant's interest had wholly terminated; but he was joined as a defendant and sued in respect of his responsibility for the alleged breaches of covenant. He took the point that the action was not competent, at any rate against him, because no leave had been obtained to serve him, the tenth defendant. The judge rejected that view, and he interpreted the word " lessee " in the relevant parts of the Act of 1938, as amended, as excluding the tenth defendant, who, when the action started, had no interest in the premises at all. The case was, therefore, somewhat relied upon by Mr. Sheen, because, of course, when this action was started the lease was surrendered and there was, therefore, no lessee. On the other hand, the point here was different, because beyond question the defendant here had served a counter-notice, which the tenth defendant in *Cusack-Smith*[7] had not. Therefore (as Mr. Sheen conceded) this case was not of itself sufficient to carry him home. I would, for my part, prefer to express no view on the particular ground upon which Pilcher J. decided the *Cusack-Smith* case[7]: it is not necessary for the decision of this case and, therefore, I say no more about it, and I must not thereby be taken either as approving or as disapproving the particular construction of the word " lessee " which there commended itself to Pilcher J. That matter can await a further occasion on which such a point must directly be decided.

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[7] [1958] 1 W.L.R. 611; [1958] 2 All E.R. 361.

For the reasons which I have tried to state, in this most difficult and complicated case, I have come to the conclusion that this appeal should be allowed.

Sellers L.J. I agree that the appeal should be allowed; and I agree so fully with what my Lord has said that I have nothing of substance to add to it.

I feel some sympathy with the county court judge, because it is clear that different views may be taken of this matter and he had not the advantage of having before him a judgment which had been delivered by Sir Brett Cloutman sitting as an official referee. The helpful arguments of both the counsel have further revealed the difficulties involved in the interpretation of the Leasehold Property (Repairs) Act, 1938. It is a short Act, and, so far as I can see, it relates only to leases where the unexpired term is five years or more: that is the ambit of its operation. It would not be, I think, within the purpose and compass of the whole scheme to enlarge the interpretation of subsection (3) in the manner which has been submitted by counsel and was acceded to by the judge in the court below. I agree, as has been argued, that the words are specific, because there is no doubt that the enforcement by action for damages where the unexpired period of a lease is five years or more is restricted. Subsection (3) definitely provides the restriction. It gives the "benefit of the Act," as it is said in subsections (1) and (2), to the lessee that he cannot be proceeded against under either proceeding unless there has been the leave of the court. But I do not find that subsection (3) is otherwise specific as to its time of operation when the Act as a whole is looked at. Its scheme, it seems to me, indicates that the subsection can only be invoked when the lessor is attempting to do that which the previous subsections deal with—in this case to claim for damages for failure to repair when the unexpired period is as great as therein specified. Here there is in fact no unexpired period at all: the lease had been surrendered. I prefer the view which my Lord has stated—that the amended defence relied on in this case cannot prevail and that the action was properly constituted—and I suppose must be restored for consideration.

Pearce L.J. I agree with all that has been said.

The serving of a counter-notice entitles the tenant to "the "benefit of the Act." Section 1 as a whole seems to make it clear that the intended "benefit of the Act" is that proceedings shall not be brought without leave until the five-year period starts. Did the legislature, by subsection (3), intend to add a further somewhat irrational benefit, with no merits, in certain cases, encroaching on the whole of that five-year period? On reading the section of the Act as a whole, I cannot believe that that was intended. It is true that the words "no proceedings "shall be taken" in subsection (3), when read in isolation, seem to have that result; and I fully sympathise with the difficulties which were felt by the judge; but, when those words are read with the rest of the section and the rest of the Act, it becomes clear, in my opinion, that that was not their intended meaning, and that the prohibition is intended to refer only to proceedings before the five-year period.

For that reason, and for the other reasons, all of which have been so fully and clearly set out by my Lord in his judgment, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *Herbert Reeves & Co. for Kellock & Cornish-Bowden, Totnes, Devon; Crane & Hawkins.*

B. A. B.

CARAPANAYOTI & CO. LTD. *v.* E. T. GREEN LTD.

1958
July, 3, 4, 18.

McNair J.

Sale of Goods—C.i.f.—Route—Customary at time of performance—Closure of canal—Frustration.
Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Whether obligation to send goods round Cape.
Contract — Performance — Customary manner — Time when manner customary.

By a written contract dated September 6, 1956, sellers agreed to sell to buyers cottonseed cake for shipment from Port Sudan during October/November at sellers' option, c.i.f. Belfast. At the date of the contract the usual and customary route for the shipment of goods from Port Sudan to Belfast was via the Suez Canal. On November 2, the Suez Canal was closed to navigation. The sellers did not ship the contract goods:—

Held, (1) that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for.

(2) That the sellers' obligation under the present contract was not confined to shipping by a route which was usual and customary at the date of the contract, but was to ship by a route usual and customary at the time of performance.

(3) That the doctrine of frustration might be applied to a contract for the sale of unascertained goods, even where no illegality was involved, though it could only properly be applied to such a contract in exceptional circumstances.

Ashmore & Son v. *C. S. Cox & Co.* [1899] 1 Q.B. 436; 15 T.L.R. 55 doubted.

(4) That the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, and to impose on the sellers the obligation to ship by an emergency route via the Cape would be to impose on them a fundamentally different obligation, and, accordingly, the contract was frustrated.

SPECIAL CASE stated by the Board of Appeal of the London Cattle Food Trade Association.

By a contract dated September 6, 1956, on the standard printed form No. 6 headed "Contract for Imported Feeding "Cakes and Meals—C.I.F. Terms" issued by the London Cattle Food Trade Association, the appellants, Carapanayoti & Co. Ltd., London (hereinafter called the sellers), sold to E. T. Green Ltd., Belfast (hereinafter called the buyers), through brokers by whom the contract was negotiated, 100 tons of Sudanese semi-decorticated expeller cottonseed cake at £28 15s. per ton of 2,240 lbs. for shipment per steamer and/or steamers, direct or indirect, with or without transhipment from Port Sudan during October/November, 1956, at sellers' option, cost, freight and insurance to Belfast. Clause 17 of the contract provided: "In case of pro-"hibition of export, blockade or hostilities or in case of any "executive or legislative act done by or on behalf of the govern-"ment of the country of origin or of the territory where the "port or ports of shipment named herein is/are situate, pre-"venting fulfilment, this contract or any unfulfilled portion "thereof so prevented shall be cancelled. In the event of "shipment proving impossible during the contract period, sellers "shall advise buyers without delay with the reasons therefor. "If required, sellers must produce proof to justify their claim "for cancellation." The sellers covered themselves for the sale by a contract of the same date for the purchase of the 100 tons of goods of the contract description from Sudan Oil Mills Ltd., Khartoum, with whom they were closely associated in business. A warehouse certificate was produced and admitted in evidence to show that Sudan Oil Mills Ltd. had 500 tons of the contract goods in warehouse on September 1, 1956. The contracts for sale and purchase were entered into after the Suez Canal had been nationalized, that event having taken place on July 26, 1956. On October 29, 1956, armed forces of Israel invaded Egypt. On November 1, Britain and France began military operations in Egypt; on November 2 the Suez Canal was closed to navigation; on November 6 the cease-fire was declared in Egypt; on April 9, 1957, the Suez Canal was reopened to navigation. On November 13, 1956, Sudan Oil Mills Ltd. wrote to the sellers saying that they regretted that they would be unable to fulfil several contracts including the sale to the buyers, and requesting the sellers to do whatever was necessary to protect the interests of Sudan Oil Mills Ltd. On December 10, 1956, the buyers wrote to the sellers giving notice of arbitration on the ground that the shipment had not taken place within the contracted period. On December 13, 1956, the sellers replied: "Our shippers have been prevented from fulfilling this contract "by the recent hostilities in Egypt, during which the Suez "Canal became, and still remains blocked. They and we "therefore claim cancellation under clause 17. Alternatively "we contend that this contract has been frustrated by the "blockage of the Suez Canal." By letter dated December 14, the buyers repudiated the sellers' contentions.

On the dispute being submitted to arbitration and the arbitrators being unable to agree, the matter was referred for decision to an umpire, who, on February 20, 1957, issued the following award: "I do hereby award that the seller is in default "and shall pay to the buyers within 14 days the difference "between contract price and the settling price of £31 15s. per "2,240 lbs. on the mean contract quantity." The sellers, being dissatisfied with the award, appealed to the Committee of the Association who elected a Board of Appeal to determine the matter.

By paragraph 4 of the case the Board of Appeal set out that they were requested to state their award in the form of a special case and the question of law for the decision of the court should be as follows: Whether on the true construction of the contract and the facts found (a) the contract was frustrated; or (b) performance was excused by clause 17. By paragraph 11 of the special case the Board of Appeal made further findings of fact which included by sub-paragraph (a): "At the time the "contract was made the usual and customary route for the shipment of goods from Port Sudan to Belfast was via the Suez

"Canal," and by sub-paragraph (b): "At the time the contract "was made shipment via the Cape was not a usual or customary "route for the shipment of goods from Port Sudan to Belfast." By paragraph 12 (1) of the special case the Board of Appeal held, subject to the decision of the court, that the sellers were in default. They accordingly awarded that the umpire's award dated February 20, 1957, should be and was confirmed. They directed that the sellers should pay the costs, charges and expenses incurred by the sellers and the buyers and the hearing fees, costs and expenses. By paragraph 12 (2) the board stated that should the answer to the question of law in paragraph 4 result in the sellers being held by the court not to have been in default, then, for the purposes of giving effect to that decision, the board directed that the umpire's award be set aside and the buyers to pay the parties' costs of the hearing incurred by the buyers and also those incurred by the sellers and the hearing fees, costs and expenses.

The facts proved or admitted before the Board of Appeal in so far as relevant are fully set out in the judgment of McNair J.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers. The short point is whether on the closure of the Suez Canal c.i.f. contracts for goods to be shipped from ports south of Suez to ports in the United Kingdom were frustrated or not; this is the first case to raise this point directly. Suez was the customary route and the contract was expected to be performed by that route. There is no finding in the case that the Cape route ever became the "usual and customary" route. It merely became an emergency route for some ships. Stated in its simplest terms, the sellers' case is that once Suez was closed and likely to remain closed during the contract period both parties were relieved from all obligations under the contract, including the sellers' obligation to ship goods.

There are five propositions on the first branch of the argument: (1) A c.i.f. seller performs his contractual obligations, so far as they are here material, only by shipping goods of the contract description and by procuring and tendering a contract of affreightment providing for the carriage of those goods by a usual and customary route. (2) The parties to this contract, not having written into their contract by which route the goods were to be carried, the contract has to be construed as if that usual and customary route was written out in full. (3) The usual and customary route at the date of the contract was via the Suez

Canal (see para. 11 (a)) and was not via the Cape of Good Hope (see para. 11 (b)). (4) Therefore one should write into this contract "shipment to be made . . . from Port Sudan via the "Suez Canal. . . ." (5) Performance of that contractual obligation became impossible owing to a supervening event beyond the control of both parties, namely, the closure of the Suez Canal, whereupon both parties became discharged from further performance. The same point can be put in another way, namely, that (6) it was an implied term of this contract that the contract of affreightment to be tendered would be a contract of carriage through Suez. That term became impossible of performance and therefore was frustrated: see Lord Loreburn in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*[1] An alternative way of putting the matter in the light of *Davis Contractors Ltd.* v. *Fareham Urban District Council,*[2] where the House of Lords disapproved of the implied term, is to say that (7) to enforce this contract in the changed circumstances after the closing of the Suez Canal would be to enforce a different contract because the shipment via the Cape would be different from the shipment via Suez. Finally, there is the point under clause 17 of the contract.

As to the first point, it is said in Kennedy on C.I.F. Contracts, 1st ed., p. 39: "In the absence of express terms in the "contract the customary or usual route must be followed." *In re L. Sutro & Co. and Heilbut, Symons & Co.*[3] supports the propositions that the route has to be the usual and customary route and that the date for ascertaining the usual and customary route is the date of the contract. If the sellers' main proposition is right, and the contract had to be performed by tendering a contract of affreightment for carriage through Suez, the other points do not arise.

[McNAIR J. The contract has to be construed in the light of surrounding circumstances. Is there any authority on whether that should be considered as at the date of the contract or later?]

Ashworth J. raised the point in *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*[4] and counsel were unable to find any authority.

[McNAIR J. If you are right that the contract should be construed as meaning shipment via Suez, then you are excused from performance. I cannot see how you can construe a contract at any other time than at the date of the making.]

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[1] [1916] 2 A.C. 397, 403; 32 T.L.R. 677.

[2] [1956] A.C. 696; [1956] 2 All E.R. 145.

[3] [1917] 2 K.B. 348; 33 T.L.R. 359.

[4] [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626.

[Reference was made to *Shipton, Anderson & Co.* v. *John Weston & Co.*[5]; *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.*[6]; *Palgrave, Brown & Son Ltd.* v. *Owners of S.S. Turid,*[7] and Scrutton on Charterparties, 16th ed., at pp. 18, 32, 199.]

On the frustration point, the judgment of Vaughan Williams L.J. in *Krell* v. *Henry*[8] and the decision in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[9] are relevant. A document at the time of tender must be an effective document on which the buyer can claim rights, otherwise it is a bad tender: *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*[10] There cannot be any difference between frustration by war and frustration by hostilities. The point under clause 17 is really another way of putting the matter, for if the sellers could have shipped the goods round the Cape, then they were not prevented by hostilities; but if they were bound to ship through Suez, then they were prevented by hostilities. The Board of Appeal came to a wrong conclusion.

Michael Kerr for the buyers. The Board of Appeal came to the right conclusion. The sellers failed to ship the goods as required by the contract, and it is elementary that the onus is on them to show that they are excused either by an express or implied term of the contract. The only relevant express term is that embodied in clause 17. There is no finding in the case that fulfilment of the contract was impossible. Accordingly, to excuse non-performance the sellers must rely on some implied term and must therefore show on what grounds any term must be implied and that the contract is frustrated by impossibility of compliance with that implied term, if any.

The first question, therefore, is what is the term which the court is being asked to imply. It must first be remembered that the contemplated route, whatever its character, was available for more than half the shipment period, and that must be taken into account because the implied term must cover that situation. Secondly, the contract is silent as to the route to be adopted.

[5] (1922) 10 Ll.L.Rep. 762.

[6] [1916] 1 A.C. 314; 32 T.L.R. 115.

[7] [1922] 1 A.C. 397; 38 T.L.R. 423.

[8] [1903] 2 K.B. 740; 19 T.L.R. 711.

[9] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[10] [1916] 1 K.B. 495; 32 T.L.R. 186.

Thirdly, the sellers have no finding that there was no customary route after Suez became blocked. Fourthly, there is no finding of custom in the strict sense of the word on the basis of which the parties contracted, and there is no finding that the parties contracted on the basis that shipment was to be by Suez. All that was found was that at the date of the contract Suez was the usual and customary route. The implied term for which the sellers contend must fall into two parts: first, that a seller under a c.i.f. contract may only ship by a route which is customary at the date of the contract, and, secondly, that if on or after the date of shipment that route is no longer available, then the sellers are discharged from all liability. There is no authority for the implied term for which the sellers contend, and *In re L. Sutro & Co. and Heilbut, Symons & Co.*[11] does not assist them.

The buyers rely on three propositions: (1) A c.i.f. contract for unascertained goods can only be frustrated if the performance of it becomes illegal or involves illegality, e.g., trading with the enemy, prohibition of export: *Ashmore & Son* v. *C. S. Cox & Co.*,[12] approved in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*[13] If this contract is held to be frustrated, it would be the first c.i.f. contract ever to be held to be frustrated except on the ground of illegality.

[McNAIR J. If the whole of the prescribed cottonseed cake was destroyed before shipment, would not that frustrate the contract: *Howell* v. *Coupland*[14]?]

In *W. J. Sargant & Sons* v. *Eric Paterson & Co.*[15] and *Ashmore's* case[16] it was held that the impossibility of making the shipment did not frustrate a c.i.f. contract.

(2) The term to be implied in a c.i.f. contract as to the documents which the sellers are required to tender is that they must be a fair and reasonable tender at the time when the tender is made, i.e., bill of lading and policy or certificate of insurance must contain terms which are either usual or customary in the trade at the date of the tender, or if there are no usual or customary documents covering that type of contract they must be a reasonable tender in the circumstances. When one applies that implied term to the route of shipment, the route covered by the bill of lading must be the customary or usual route at the date of the tender or, alternatively, at the date of shipment; for

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[11] [1917] 2 K.B. 348.

[12] [1899] 1 Q.B. 436; 15 T.L.R. 55.

[13] [1918] 2 K.B. 467, 470; 34 T.L.R. 508.

[14] (1876) 1 Q.B.D. 258.

[15] (1923) 129 L.T. 471.

[16] [1899] 1 Q.B. 436.

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present purposes it does not matter which. If there is no customary or usual route, because of its novel nature, it must be a reasonable route which will be the direct route. Of course a customary or usual route at the date of the contract will be good evidence of a reasonable route at the date of shipment if there is no change of circumstances. The contract has to be performed reasonably.

(3) Assuming that the first and second submissions are wrong and that the contract is capable of being frustrated by impossibility and the implied term is that for which the sellers contend, then the term to be implied in any event goes no further than this: if the usual route at the date of the contract is not available throughout the shipment period the sellers are excused providing that they have exercised due diligence and tried to fulfil the contract. On the authority of *Ashmore's* case [16] and the *Blackburn Bobbin* case [17] the sellers should have found an alternative route because they had agreed to ship goods or pay damages.

If clause 17 applies the sellers succeed despite *Ashmore's* case,[18] but clause 17 means that the sellers must be legally prevented from performance. If there were any shipments which had gone through Suez then the sellers had to buy afloat. There is nothing in the contract which prevents the tender of documents unless it is shown that no ship went through Suez during the shipment period. Not only did the sellers never ship the goods, they made no attempt to procure shipping space. It is not conceded that the route by which the goods are to be shipped is a vital point in a c.i.f. contract. The implication that the usual or customary route at the date of the contract is the only route by which the contract is to be performed is one which restricts the efficacy of the contract. It excludes alterations of route and makes for rigidity. A term that performance of a contract must be in accordance with usage or custom can be implied: *In re Comptoir Commercial Anversois* v. *Power, Son & Co.*[19] To give business efficacy to the contract one could write into it either a term that the sellers must tender bills of lading in the customary form as at the date of shipment or that shipment should be by the customary route at the date of shipment.

If the court is asked to hold that there is frustration, it must have regard to *Davis Contractors Ltd.* v. *Fareham Urban District Council* [20] and ask itself: (1) Must the parties have made the contract on the footing that if the canal was no longer available during part of the shipment period both parties were to be discharged (see Lord Radcliffe's speech [21])? (2) Was the closure of the canal "fundamental enough to transmute" the sellers' obligation into an obligation of a different kind "which the "contract did not contemplate and to which it could not apply" (see Lord Reid's speech [22])? (3) Would the reasonable man have said: "If the canal is closed after November 2, 'it is all "'over between us'" (see Lord Reid,[23] citing Lord Loreburn in the *Tamplin Steamship* case [24])?

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[16] [1899] 1 Q.B. 436.
[17] [1918] 2 K.B. 467.
[18] [1899] 1 Q.B. 436.
[19] [1920] 1 K.B. 868; 36 T.L.R. 101.
[20] [1956] A.C. 696.

The surrounding circumstances are not what the parties at that time contemplated but what they were deemed to have contemplated as reasonable persons having regard to changing conditions. The true construction of this contract is that shipment must be made by a customary route at the date of shipment. The sellers are asking the court to imply a narrow term that fails to take into account that c.i.f. contracts are frequently made on a long term forward basis and that the usual route may change rapidly: *Reardon Smith Line Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[25] The sellers' implied term does not give effect to the principle that if a contract can be performed in several ways and one becomes impossible then an alternative way has to be used. The sole difference ultimately between the sellers' submission and that of the buyers is whether one writes into the contract the usual route at the date of the contract or at the date of shipment. The buyers' contention gives business efficacy to the contract; the sellers' produces frustration. The basic fallacy of the sellers' argument is that they give to the words "customary route" the force and effect of a custom written into the contract instead of giving them their usual meaning, which is performance by what is customary at the date of performance. [Reference was made to *Postlethwaite* v. *Freeland* [26]; Carver's Carriage of Goods by Sea, 10th ed., pp. 372–374; Scrutton on Charterparties, 16th ed., p. 128 and note (*d*); *W. J. Sargant & Sons* v. *Eric Paterson & Co.*[27]; *Société Cooperative Suisse des Céréales et Matières Fourragères* v. *La Plata Cereal Co. S.A.*[28]; *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*[29]; *In re Badische Co. Ltd.*[30]]

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[21] [1956] A.C. 696, 727.

[22] Ibid. 723.

[23] Ibid. 719, 720.

[24] [1916] 2 A.C. 397, 404.

[25] [1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444.

[26] (1880) 5 App.Cas. 599.

[27] (1923) 129 L.T. 471.

[28] (1947) 80 Ll.L.Rep. 530, 544.

[29] [1916] 1 K.B. 495.

[30] [1921] 2 Ch. 331.

Under a c.i.f. contract a sellers' obligation is to ship by a customary route at the date of shipment, and leaving aside *Ashmore's* case,[31] if a seller does not ship, he must show that there was no customary route at the date of shipment, and in the present case the sellers have no such finding although there is a finding in favour of the buyers which is tantamount to saying that the new route is round the Cape. Accordingly, the sellers' obligation was to ship through the Suez Canal until November 2, and to ship round the Cape thereafter. [Reference was made to Roche J. in *Upjohn* v. *Hitchens* [32] in which he followed Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.*[33]]

Eustace Roskill Q.C. in reply. If the buyers are right, the law required the sellers to perform the contract in a way which neither party ever dreamt of at the date of the contract—a startling proposition which would not appeal to business men. *Ashmore & Son* v. *C. S. Cox & Co.*[34] and the others are all cases in which, on the particular facts, the sellers assumed absolute obligations to perform. None of them lays down a general principle. The basis of the frustration principle is that, if parties have contracted on the tacit assumption that some state of affairs will continue to subsist during the currency of the contract, the destruction of that tacit assumption carries with it destruction of the contract. [Reference was made to Lord Reid's speech in *Davis Contractors Ltd.* v. *Fareham Urban District Council* [35] citing from *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works.*[36]] The sellers' obligation is simply to ship on such days as they decide. If they do not ship in October and in November are prevented, the contract is frustrated. [Reference was made to Lord McNair's Legal Effects of War, 3rd ed., pp. 304 et seq.]

Clause 17 raised the same point as that raised by the sellers' broader point. In construing clause 17 one has to take into account that the sellers have the option when they will ship, otherwise if the buyers are right, the sellers would not be able to rely on a prohibition in the second month, because they could have performed in the first month. It was common ground that blocking the Canal was due to hostilities. Assuming that the obligation is that for which the sellers contend then there was frustration; alternatively, if the buyers are right on that point, the sellers succeed under clause 17.

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[31] [1899] 1 Q.B. 436.

[32] [1918] 1 K.B. 171, 179; 34 T.L.R. 79.

[33] [1911] 1 K.B. 214, 220; 27 T.L.R. 47.

[34] [1899] 1 Q.B. 436.

[35] [1956] A.C. 696, 721.

[36] [1949] 2 K.B. 632, 667; [1950] 1 All E.R. 208.

[McNAIR J. The question still remains whether the obligations are to be determined at the date of the contract or at the date of performance.]

The Cape was never the customary route; it was simply an emergency route until the Canal was reopened. If that is wrong, reliance is placed on *S.S. Matheos* v. *Louis Dreyfus & Co.*[37] If the contemplated method of performance fails, then the party seeking to allege that an alternative method was available has to show that it was not only physically available but commercially possible in all the changed circumstances.

Cur. adv. vult.

McNAIR J. This matter comes before me in the form of an award stated by the Board of Appeal of the London Cattle Food Trade Association in the form of a special case on certain questions of law for the decision of this court and raises important questions as to the effect of the closing of the Suez Canal in November, 1956, upon c.i.f. contracts for the sale of goods to be shipped from ports to the south of Suez made at a time when the only usual and customary route for shipment of such goods was via the Suez Canal.

The following facts are taken from the special case. By a contract dated September 6, 1956, on the standard printed form headed: "Contract for Imported Feeding Cakes and Meals: "C.i.f. terms" issued by the London Cattle Food Trade Association, Carapanayoti & Co. Ltd. of London (hereinafter referred to as the sellers) agreed to sell to E. T. Green Ltd. of Belfast (hereinafter referred to as the buyers) 100 tons of Sudanese semi-decorticated cottonseed cake at £28 15s. 0d. per ton for shipment per steamer or steamers, direct or indirect, with or without transhipment, from Port Sudan during October/November at sellers' option, cost, freight and insurance to Belfast.

[His Lordship read clause 17 of the contract and continued:] The Suez Canal was nationalized on July 26, 1956; but at the date of the contract, namely, September 6, 1956, the usual and customary route for the shipment of goods from Port Sudan to Belfast was via Suez and the route via the Cape was not a usual or customary route for such shipments.

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[37] [1925] A.C. 654; 41 T.L.R. 393.

Though, after nationalization, it was known that shipments via the Canal were uncertain and subject to delay, sellers and buyers of cottonseed cake from Port Sudan c.i.f. United Kingdom ports at a time when the contract in question was made would assume that the goods, as theretofore, would be shipped via the Canal, and it was not then generally known that vessels passing through the Canal ran risks of detention or confiscation.

On October 29, 1956, armed forces of Israel invaded Egypt; on November 1, Great Britain and France began military operations in Egypt, and on November 2, the Suez Canal became closed to navigation by reason of the physical blocking of the Canal by the Egyptian authorities, such action being by concession rightly made before me an act of hostilities within the meaning of clause 17. On November 6, the cease-fire was declared in Egypt. After the closure of the Suez Canal to navigation on November 2, freight via the Canal became impossible and all shipments from the Sudan had to be made via the Cape until the Canal was reopened to shipping on April 9, 1957. During the months of October and November, 1956, no goods of the contract description were shipped from Port Sudan for Belfast on vessels which, in fact, proceeded on their voyage via the Suez Canal; but during November, 1956, 14 vessels called on various dates at Port Sudan, loaded cargo and proceeded to their several destinations in the United Kingdom and elsewhere in Europe via the Cape. The distance from Port Sudan to Belfast via the Suez Canal is 4,068 miles and via the Cape 10,793 miles. Before the closing of the Canal the normal freight rate for the voyage from Port Sudan to Belfast was £6 10s. per ton. On November 9, 1956, a surcharge of 25 per cent. was imposed on freight as a result of the closing of the Canal, which was increased on December 12 to 100 per cent.

Though the sellers had covered themselves for their sale by a purchase on the same date from Sudan Oil Mills Ltd., Khartoum, and 500 tons of goods complying with the contract were in warehouse at Khartoum at that date, no space was at any time booked by the sellers for the shipment of the 100 tons, and they made no endeavour at any time to procure shipping space for their shipment. It was apparent very soon after the closing of the Canal that the closing would last a considerable time—certainly until after the end of November. The sellers could not, after the closing of the Canal on November 2, have purchased afloat on c.i.f. Belfast terms 100 tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal.

(The case also raised questions as to an alleged trade custom as to the acceptance by Belfast c.i.f. buyers of cottonseed cake from Sudan of transhipment bills of lading issued at a port of transhipment instead of through bills of lading from the port of shipment to the port of ultimate destination; but as this custom was negatived by the Board of Appeal no question now arises upon it.)

The question left for the decision of this court is whether, on the true construction of the contract and on the facts found, (a) the contract was frustrated, or (b) performance was excused by clause 17. Subject to the decision of the court on this question, the Board of Appeal, affirming the original umpire, found the sellers to be in default.

It was common ground between the parties, and, indeed, is clear law: (1) That under this form of contract the seller performs his obligation by shipping or procuring the shipment of goods of the contractual description on a vessel bound for the contractual destination (subject to the right of transhipment where specified in the contract) and by tendering to the buyer the shipping documents, namely, an invoice for the amount due, a bill or bills of lading for the carriage of goods and a policy of insurance covering the goods to their destination; and (2) that, where as here the time of shipment is specified as, for example, "October/November at seller's option," the seller has until the last day of permitted shipment in which to perform his shipping obligations. The seller must also, subject to any expressed term in the contract, ship the goods in such condition that, when carried under normal conditions of carriage, they will, in the absence of extraneous circumstances, arrive in sound condition. In this concise statement of the seller's obligations I have omitted the qualification that the seller can perform his obligation by procuring or buying on the market a bill or bills of lading issued to shippers other than himself, provided that the bill or bills of lading comply with the contract since, as stated above, it is found by the case that the sellers could not, after the closure of the Canal, have purchased afloat on c.i.f. Belfast terms 100 tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal.

In these circumstances, the first way in which the sellers put their case was as follows: (1) A c.i.f. seller performs his contractual obligations (so far as is material on the facts found) only by shipping goods of the contractual description and by procuring and tendering a bill or bills of lading providing for carriage by a route which is *at the date of sale contract* a usual and customary route, or, if there is, at that date, only one usual and customary route, by that route; (2) the parties to the contract not having specified the route, the contract has to be construed as if the usual and customary route had been written out in full in the sale contract; (3) the usual and customary route at the date of the sale contract was via the Suez Canal, and the route via the Cape was not a usual and customary route; (4) there must, accordingly, be written into the contract after the words "from "Port Sudan" the words "via Suez Canal"; (5) performance of the contractual obligation as to shipping so specified became impossible owing to the occurrence of a supervening event beyond the control of both parties, namely, the closing of the Suez Canal on November 2, and, accordingly, both parties were discharged from the contract on the grounds of frustration.

The validity of this argument, or this method of putting the case, depends on two main submissions: (1) That the nature and extent of the shipping obligation, in particular in relation to route, must be ascertained as at the date of the sale contract; and (2) that the route so ascertained must then be written into the contract. The buyers join issue on both these points.

It is true that in *In re L. Sutro & Co. and Heilbut, Symons & Co.*,[1] in the Court of Appeal, there are passages in the judgments which support the sellers' argument on the former point. In that case the facts were shortly as follows: By a contract dated March 27, 1916, on the printed form for c.i.f. sales issued by the Rubber Trade Association the sellers agreed to sell to the buyers 25 tons of rubber c.i.f. to be shipped from the East to New York. The sellers made a declaration of shipment from Singapore via Seattle on the Pacific Coast of the U.S.A. to be forwarded thence by rail to New York. Buyers rejected the tender and claimed arbitration. The arbitrators found that after the outbreak of war in August, 1914, great difficulty was experienced in obtaining space for shipment from the East and, in consequence of this difficulty, in about October, 1915, namely, before the contract date, shipments from the East to the Eastern States of the U.S.A., which had hitherto gone directly or indirectly the whole distance to New York by sea, began to be made by steamers to a port on the Western seaboard of the

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[1] [1917] 2 K.B. 348; 33 T.L.R. 359.

U.S.A., whence they were transmitted by rail to destination, and that at the date when the contract was entered into this route was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of that then in issue. The arbitrators, subject to the opinion of the court, upheld the tender as a good tender. Swinfen Eady L.J. and Bray J., affirming Lush J., held that the tender was bad on the grounds that, on the construction of the particular contract there in question, a custom or usage permitting a substantial part of the transit to be by rail would be inconsistent with, and repugnant to, the express terms of the contract which provided, in effect, for transport by a sea-going vessel. Scrutton L.J. dissented.

It is, in my judgment, quite clear that, having regard to the fact that the alternative route by rail was in existence at the date of the contract, the point at present in issue was not present in the minds of the court.

In principle, it seems to me that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. This is particularly so in the case of forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in mind that in mercantile matters custom and usage are subject to rapid change: see the speech of Lord Wright in *Reardon Smith Line Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[2] For example, in times of strained international relations the customary form of bills of lading may change by the universal acceptance of a particular form of war-risk protection. Can it be said that the seller is bound to tender the form of bill of lading which was customary at the date of the contract when, by the time when performance has arrived, that form has been supplanted by another customary form? I think not.

In *Postlethwaite* v. *Freeland*[3] it was held that the charterers' obligation under a charterparty to discharge with all despatch according to the custom of the port must be judged in reference to all the circumstances existing at the time of discharge. Again, when a charterparty provides for the nomination of a safe port by the charterer, it is not sufficient that the port is safe when nominated; it must be safe when the vessel arrives. A fortiori,

[2] [1939] A.C. 562, 576; 55 T.L.R. 929; [1939] 3 All E.R. 444.

[3] (1880) 5 App.Cas. 599.

it is not sufficient that it is safe at the date of the contract. *Duncan* v. *Köster (The Teutonia).*[4]

In my opinion, as a matter of principle, the sellers' obligation under a contract such as this where no route is specified is not confined to shipping by a route which was a usual and customary route at the date of the sale contract, but is to ship by a route usual and customary at the time of performance. I am fortified in this conclusion by the observations (admittedly obiter) of Roche J. in *Upjohn* v. *Hitchens*,[5] following Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.*[6] to the effect that on a sale of goods on c.i.f. terms the seller's obligation as to insurance is to insure upon terms current in the trade at the time when he comes to insure, and I do not think that the fact that in the contract here in question express provision to that effect is made in clause 16 in relation to insurance should deter me from applying the principle to the form of the bill of lading and the route.

If this is right, it is not necessary to express any concluded opinion on the second point, namely, whether the legal effect of a finding that the only usual and customary route at the date of the contract was via the Suez Canal is the same as if the words "via Suez Canal" were expressly written into the contract. It is sufficient to say that, in my opinion, there may well be cases in which the legal effect would be different.

I now turn to the alternative way in which the sellers put their case, namely, that it was an implied term of the contract of sale that at the time when, within the contract period, the sellers elected to ship the goods, the Suez Canal should be available, or (putting the case slightly differently) that to enforce the sale contract in the changed circumstances after the closing of the Suez Canal would be to enforce a different contract because the obligation to procure shipment via the Cape would be a different obligation from procuring shipment via Suez, and that accordingly, on the closure of the Suez Canal, the contract was frustrated.

In approaching this method of putting the case I should first deal with the broad submission advanced on behalf of the buyers that, in the case of a contract for the sale of unascertained goods, the doctrine of frustration can only operate if the performance becomes illegal or involves illegality. It was submitted that there was no reported decision in which the doctrine had been applied to such a contract, except where the frustration was based upon subsequent illegality. This may be so, but I am not satisfied that it is so. The matter is fully discussed in Lord McNair's "Legal Effects of War," 3rd ed., at pp. 307 et seq. I refer in particular to the judgment of Russell J. in *In re Badische Co. Ltd.*[7] where the judge says: "I can see no reason why, "given the necessary circumstances to exist, the doctrine should "not apply equally to the case of unascertained goods. It "is, of course, obvious from the nature of the contract that "the necessary circumstances can only very rarely arise in the "case of unascertained goods." Further, I venture to doubt whether *Ashmore & Son* v. *C. S. Cox & Co.*,[8] though accepted as accurate by Pickford L.J. in *Blackburn Bobbin Co. Ltd.* v. *T. W. Allen & Sons Ltd.*,[9] is consistent with modern authorities, unless it is explained on the footing that it was not, in fact, a case of supervening impossibility, the war having broken out before the date of the contract. (See "Legal Effects of War," supra, at p. 304.) I therefore approach the problem from the point of view that the doctrine of frustration may be applied to a contract for the sale of unascertained goods even where no illegality is involved, though it can only properly be applied to such a contract in exceptional circumstances.

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[4] (1872) L.R. 4 P.C. 171.

[5] [1918] 1 K.B. 171, 179; 34 T.L.R. 79.

[6] [1911] 1 K.B. 214, 220; 27 T.L.R. 47.

Though, after the decision in the House of Lords in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*,[10] many believed that the theory of the implied term had been authoritatively accepted as the basis of the doctrine of frustration, the embers of this old controversy glowed again in the decisions of the House in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[11] and in *Davis Contractors Ltd.* v. *Fareham Urban District Council*[12]; and I feel that it would be presumptuous for me to attempt to choose between the different tests suggested and unnecessary because, on my appreciation of the facts, the same result would follow whichever of the classic tests is accepted.

On the basis of the speeches in the last case cited, Mr. Kerr, on behalf of the buyers, in my judgment rightly posed the following three questions, which he submitted should each receive a negative answer: (1) Must the parties have made their bargain on the basis that, if the Canal was no longer available when the sellers elected to perform, the contract would be off?: see *per* Lord Radcliffe,[13] adopting the language of Lord Loreburn in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*[14] (2) Was the closure of the Suez Canal a circumstance fundamental enough to transmute the sellers' obligation into an obligation of a different kind, which the contract did not contemplate, and to which it could not apply?: see *per* Lord Reid,[15] adopting the language of Asquith L.J. in *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works.*[16] (3) Would the answer to the "officious bystander" have been: "Of course, if the Canal is closed after November 2, the contract "is off"?: see MacKinnon L.J. in *Shirlaw* v. *Southern Foundries (1926) Ltd.*[17] and Lord Radcliffe in the case last cited.[18]

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[7] [1921] 2 Ch. 331, 382.

[8] [1899] 1 Q.B. 436; 15 T.L.R. 55.

[9] [1918] 2 K.B. 467, 470; 34 T.L.R. 508.

[10] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[11] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[12] [1956] A.C. 696; [1956] 2 All E.R. 145.

It is the function of the court to determine, as a matter of law, whether frustration arises on the court's appreciation of the facts found and of the legitimate inference to be drawn from such facts. In my judgment, on the facts as stated in the case, each of these questions must be answered in the affirmative. At the time when the contract was made buyers and sellers of cottonseed cake from Port Sudan c.i.f. United Kingdom ports would assume that the goods, as theretofore, would be shipped via the Canal. The Suez Canal had, since its opening, been one of the main arteries of international trade. and at the time when the contract was made was the only usual and customary route for the shipment of goods from Port Sudan to United Kingdom ports. No one would think of shipping by any other route. It is difficult to conceive of any more fundamental change in such a trade than the closing of the Canal, and there is no finding in the case that, at least up to the end of November, 1956, the route via the Cape was anything more than an emergency route. Though it is true that an increase of freight rate of 25 per cent. falling on the seller would not of itself warrant the discharge of the contract, since mere commercial unprofitableness does not justify frustration, especially in a speculative forward contract: see *per* Lord Sumner in *Larrinaga & Co. Ltd.* v. *Société Franco-*

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[13] [1956] A.C. 696, 727.

[14] [1916] 2 A.C. 397, 403; 32 T.L.R. 677.

[15] [1956] A.C. 696, 723.

[16] [1949] 2 K.B. 632, 667; [1950] 1 All E.R. 208.

[17] [1939] 2 K.B. 206, 227; 55 T.L.R. 611; [1939] 2 All E.R. 113.

[18] [1956] A.C. 696, 728.

Américaine des Phosphates de Medulla, Paris,[19] yet the voyage via the Cape was more than 2½ times the length of the voyage via the Canal and includes what the author of "The Second "World War" feelingly describes as "the long haul round "the Cape"—a circumstance which may involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in shipment via the Canal.

I feel no doubt at all that the continued availability of the Suez route was a fundamental assumption at the time when the contract was made, that to impose upon the sellers the obligation to ship by an emergency route via the Cape would be to impose upon them a fundamentally different obligation which neither party could, at the time when the contract was made, have dreamed that the sellers would be required to perform and that, if the parties to the contract had thought of the matter at the time, both, as reasonable men, would have accepted at once that, if the Canal was closed for an indefinite period at a time when the sellers were not in breach for failure to ship earlier, the contract would be off. Justice and reason require that, in these circumstances, both parties should be relieved from their obligations on the happening of the closing of the Canal without default of either party.

This conclusion makes it unnecessary for me to express any concluded opinion on the effect of clause 17. It is sufficient for me to say that, in my opinion, the closing of the Suez Canal as an act of hostilities did, on the facts found, prevent fulfilment of the sellers' obligation to ship, properly construed.

I accordingly answer the questions put in paragraph 4 of the case in the affirmative, with the result that the alternative award stated in paragraph 12 (2) takes effect. The sellers must also have the costs of the argument before me.

Award accordingly.

Solicitors: *Richards, Butler & Co.; Thomas Cooper & Co.*

C. J. E.

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[19] (1923) 29 Com.Cas. 1, 18.

C. C. C.

1958
Sept. 22.

Salmon J.

REGINA *v.* MACKINNON AND OTHERS.

Criminal Law—Fraud—Investments—"Reckless making of . . . forecasts"—Whether "recklessness" in statutory context connotes dishonesty—Prevention of Fraud (Investments) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 16), *s.* 12 (1).

M. was charged, jointly with others, with offences involving the reckless making of statements and forecasts which were misleading, false or deceptive to induce persons to buy shares, contrary to section 12 (1) of the Prevention of Fraud (Investments) Act, 1939. On a submission that the word "reckless" in the section imputed an element of dishonesty, and that, accordingly, the defendant could not be convicted unless it were shown that he had not honestly believed the truth of the statements and forecasts to which he had been a party:—

Held, that the court, in deciding the intended meaning of words in a statute, would not construe them as creating a criminal offence unless they did so in the clearest language; that the purpose of the Prevention of Fraud (Investments) Act, 1939, as proclaimed by its title, indicated that it was not intended to include in its provisions offences which had nothing to do with fraud; accordingly, the word "reckless" meant "not caring whether the statement was true or "false."

Derry v. *Peek* (1889) 14 App.Cas. 337; 5 T.L.R. 625 applied.

Rex v. *Bates and Russell* [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842 not followed.

TRIAL ON INDICTMENT.

Frank Hay Livingstone Mackinnon was charged, jointly with others, on an indictment containing, inter alia, four counts which alleged that the accused had induced certain persons to enter into agreements for acquiring shares by the reckless making of statements and forecasts which were misleading, false or deceptive, contrary to section 12 (1) of the Prevention of Fraud (Investments) Act, 1939.[1] At the close of the case for the prosecution, counsel for Mackinnon submitted that the word "reckless" in the section involved, not only a high degree of negligence, but also an element of dishonesty or fraud, and that the jury should be so directed. The case is reported solely upon this point.

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[1] Prevention of Fraud (Investments) Act, 1939, s. 12: "(1) Any "person who, by any statement, "promise or forecast which he knows "to be misleading, false or deceptive, "or by any dishonest concealment of "material facts, or by the reckless "making of any statement, promise "or forecast which is misleading, "false or deceptive, induces or "attempts to induce another person— "(*a*) to enter into or offer to enter "into—(i) any agreement for, or with "a view to, acquiring . . . securities ". . . shall be guilty of an offence, "and liable to penal servitude for a "term not exceeding seven years."

Maxwell Turner and *Mervyn Griffith-Jones* for the Crown.

H. J. Phillimore Q.C. and *David Lloyd* for the defendant Mackinnon.

Peter Rawlinson for the defendant Limpkin.

Neville Faulks and *David Hurst* for the defendant Barnett.

R. E. Seaton for the defendant Cole.

F. H. Lawton Q.C. and *William Howard* for the defendant Whitehead.

Sebag Shaw for the defendants Whitehead Industrial Trust Ltd.

H. J. Phillimore Q.C. for the defendant Mackinnon. "Reck-"lessness" in this context must amount to fraud. A statute which creates a criminal offence must be construed in favour of the subject: Maxwell on Interpretation of Statutes, 9th ed., pp. 268, 288. This statute must be construed in accordance with its object as stated by Parliament, namely, the prevention of fraud. In construing the word "reckless" in this statute, one must also have regard to the existing law and apply a meaning consistent with it. Since *Derry* v. *Peek*,[2] recklessness in matters of fraud has always been coupled with the definition "not caring "whether the statement was true or false." *Rex* v. *Bates* [3] was wrongly decided.

Maxwell Turner for the Crown. The object of a statute is only relevant to its construction where there is ambiguity in its wording. Here there is none. The section here being considered creates three offences, (i) knowingly making a misleading or false statement or forecast, (ii) dishonestly concealing material facts, and (iii) recklessly making a misleading or false statement or forecast. The difference between the first and third offences is that whereas the first must be dishonest, the third need not be so. The word "reckless" is not qualified and must be given its full and unrestricted meaning, namely, "careless," "heed-"less," "inattentive to duty": *Rex* v. *Bates*,[3] *Rex* v. *Hindes and Musgrove*.[4] Although the point was not argued in *Reg.* v. *Russell*,[5] the Court of Criminal Appeal did not dissent from the decision of Donovan J. in *Rex* v. *Bates*.[3] In *Derry* v. *Peek* [6] Lord Herschell forecast that negligence of this type might become the subject of legislation.

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[2] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

[3] [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842.

[4] (1951) unreported.

[5] [1953] 1 W.L.R. 77.

[6] (1889) 14 App.Cas. 337, 376.

Salmon J. referred to the provisions of section 12 (1) of the Prevention of Fraud (Investments) Act, 1939, and continued: It is contended on behalf of the Crown that the word "reckless" in that section means no more than "very careless" and that, accordingly, anyone who very carelessly makes a false statement, promise or forecast and thereby induces or attempts to induce another to enter into any agreement for acquiring securities commits a criminal offence. According to the Crown's argument, providing the accused person is proved to have been very careless, he is guilty of this criminal offence, carrying with it a maximum sentence of seven years' imprisonment, even if he honestly believed in the truth of what he wrote or said.

It is contended on behalf of the defence that the word "reckless" means "not caring whether the statement, promise "or forecast be true or false," and that if an accused person honestly believed in the truth of what he had said or written he cannot be guilty of an offence under this section. *Rex* v. *Bates and Russell*,[1] a decision of Donovan J., is clearly in favour of the Crown's contention, and is supported by an obiter dictum of the Court of Criminal Appeal.[2] *Rex* v. *Bates and Russell* is a highly persuasive authority, but it is not binding on me.

It is unnecessary for me to say with what profound respect I regard any judgment of Donovan J. or any observations of the Court of Criminal Appeal. I have, however, the great misfortune to differ from Donovan J. upon the true construction of this statute. I do so with misgiving and diffidence, but as I have reached a clear conclusion on the matter I must give effect to it.

It is conceded that the word "reckless" is capable of either of the two rival meanings for which the Crown and the defence respectively contend. When a word is used in a statute which may bear one of two meanings, I know of no canon of construction that compels the court to adopt the wider of the two meanings merely because it is the wider. The court must look at the word in its context in the statute, and decide which meaning Parliament intended it to bear. Moreover, the courts are slow to construe a statute as creating a criminal offence unless the statute does so in the plainest terms.

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[1] [1952] W.N. 506; 36 Cr.App.R. 175; [1952] 2 All E.R. 842.

[2] *Reg.* v. *Russell* [1953] 1 W.L.R. 77.

Ever since *Derry* v. *Peek*[3] the word "reckless," used in relation to false statements, strongly suggests a statement made not caring whether it be true or false; that is, a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth.

I am here construing a statute the very name of which is the Prevention of Fraud (Investments) Act, 1939. Its purpose, as it proclaims, is to make general provision for preventing fraud in connexion with investments. Section 12 (1) deals with false statements, promises and forecasts. The cross-heading which immediately precedes this section reads: "General "provisions for the prevention of fraud." It seems to me, therefore, that it would be wrong to approach this section on the basis that unless its language compels me to a contrary view, "reckless" must bear the wide meaning contended for by the Crown rather than the meaning attributed to it in *Derry* v. *Peek*.[3]

It would be surprising if Parliament, in a section creating a number of offences whose very essence is fraud, had included an offence which has nothing to do with fraud. It is to me almost incredible that if that had been Parliament's intention it would have carried it out by the use of the word "reckless," a word which, used in relation to false statements, had by 1939 for about 40 years generally been understood to indicate fraud. When Parliament intends, as in the case of a prospectus, that the careless making of an untrue statement shall constitute a criminal offence, irrespective of fraud, it does so in the clearest language: see the Companies Act, 1948, s. 44. I can find no such clear language in the section I am considering.

The Crown relies, particularly, on the following passage in the judgment of Donovan J.[4]: "If one analyses section 12 (1), "it is found to deal with three categories of persons who have "induced or attempted to induce other persons to invest money. "The first is the person who makes a statement which he knows "to be misleading, false or deceptive; the second is the person "who dishonestly conceals material facts; and the third is the "person who recklessly makes a statement, promise, or forecast "which is misleading, false, or deceptive. Categories 1 and 2 "obviously refer to persons who are dishonest, but, after referring "to a person who has knowingly made a false statement or has "dishonestly concealed material facts, the legislature, introducing

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[3] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

[4] 36 Cr.App.R. 175, 181.

"its third category by the disjunctive 'or,' changes its language "altogether. It does not specify a person who knowingly makes "a misleading, false, or deceptive statement, promise, or fore-"cast, or dishonestly makes it. It simply specifies a person who "recklessly makes these things."

I agree that section 12 appears to deal with three categories of persons. To my mind, however, they all three have the common characteristic of dishonesty. There is very little, if any, difference between categories one and two. It would appear that category two is included only ex abundanti cautela to cover the sort of facts that existed in *Rex* v. *Kylsant*.[5] If any fact that is omitted from a statement, promise or forecast is material, it can only be material in that its omission makes what has been said misleading, false or deceptive. If the omission is dishonest, it can only be dishonest because the person who makes it knows that what he has said is misleading, false or deceptive by reason of that omission. I am inclined to think that category two is already covered by category one.

It is true that the third category is introduced by the disjunctive "or," and involves a change of language which does not include the word "dishonesty." This point, however, does not greatly impress me. The word "dishonest," which is used in the second category, is not used in the first category; and the second category is also introduced by the disjunctive "or." No one suggests that this is any reason for supposing that the first category does not involve dishonesty.

In my judgment the legislature intended this section to cover all fraudulent statements, promises and forecasts, made for the purposes specified in the section. It might, of course, have read simply: "Any person who dishonestly makes any statement, "promise or forecast which is misleading, false or deceptive ". . ." The legislature, however, recites (as is the usual practice in pleadings in civil actions) the well-known elements constituting dishonesty. To make quite certain that it covers the *Rex* v. *Kylsant*[5] type of case, it introduces the words "dis-"honest concealment of material facts." It is for this purpose essential to use the word "dishonest," because an innocent concealment would be outside the scope of this section.

It has also been argued that as the section refers, not only to statements and promises, but also to forecasts, the section must be intended to cover careless though honest forecasts

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[5] [1932] 1 K.B. 442; 48 T.L.R. 62; 23 Cr.App.R. 83, C.C.A.

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because of the difficulty in proving the absence of an honest belief in a forecast. I do not think it is permissible to construe a statute as creating a criminal offence because of the difficulties of proof which might be involved in a contrary construction. In any event, once it is proved that the forecast is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the accused who made the forecast for some purpose of his own either must have known it was untrue or had no real belief in its truth. Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statements. In my experience, juries are not slow in a proper case to draw the inference of fraud.

For those reasons I am unable to hold that this section, which makes general provisions for the prevention of fraud, has by a sidewind created an offence entirely independent of fraud. I shall, therefore, direct the jury that the word "reckless" in this section has the same meaning as that attributed to it in *Derry* v. *Peek*.[6]

Solicitors: *Director of Public Prosecutions; Isadore Goldman & Son; B. A. Perkoff; P. R. Kimber; Sole, Sawbridge & Co.; Claude Hornby & Cox.*

J. D. P.

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[6] 14 App.Cas. 337.

REGINA *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* MINERVINI.

1958
Oct. 6, 7.

Lord Parker C.J., Cassels and Streatfeild JJ.

Extradition—Offence committed on board ship—Jurisdiction of magistrate—No proof of ship's position at time of offence—Whether ship "territory" of contracting power—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 25*—Order in Council dated September* 30, 1873, *arts.* 1, 2.

Extradition—Habeas corpus—Right of requisitioning government to appear—R.S.C., Ord. 59, *r.* 17.

The applicant, an Italian seaman, was accused of having murdered another seaman on board a Norwegian ship. On arrival at a British port the applicant was committed to Brixton prison by the chief metropolitan magistrate to await extradition to Norway.

On an application for a writ of habeas corpus it was submitted that as the position of the ship at the time of the alleged crime had not been proved, it was not proved that the crime was committed "in "the territory" of Norway, and that the provision of article 1 of the Extradition Treaty of June, 1873, between Norway and the United Kingdom that: "The high contracting parties engage to "deliver up to each other, persons who, being accused . . . of a "crime committed in the territory of the one party, shall be found "within the territory of the other party . . ." only applied to crimes committed on land and, therefore, the offence in question was not extraditable or, alternatively, even if "territory" was to be given a wider meaning it would not include a ship within the territorial waters of a third power:—

Held, (1) on an application for habeas corpus where the applicant is detained pending an order of extradition, the court has power under R.S.C., Ord. 59, r. 17, to direct that the notice of motion be served on the requisitioning government.

Quaere, whether the requisitioning government can appear before the court as of right.

(2) That, on the construction of article 1 of the Treaty of June, 1873, and having regard to the list of extraditable crimes set out in article 2 (which included certain assaults committed on ships on the high seas, conspiracy and revolt on board ship) "territory" in article 1 was not to be treated in its strict sense but as equivalent to "jurisdiction" and, therefore, included Norwegian ships; that even if the ship had been in the territorial waters of a third power at the time of the alleged crime, it would not have affected the matter, for it would simply have given rise to a jurisdiction competing or concurrent with that of the Norwegian Government, and, accordingly, it was unnecessary for the chief magistrate to have evidence of the position of the ship at the time of the alleged commission of the crime before committing the applicant, and he had jurisdiction to make the order of committal.

APPLICATION for writ of habeas corpus.

The applicant, Onofrio Minervini, applied by leave of Edmund Davies J., given on September 1, 1958, for a writ of habeas corpus addressed to the Governor of Brixton Prison where the applicant was detained on an order made by Sir Laurence Dunne, Chief Metropolitan Magistrate, at Bow Street on August 25, 1958, under the Extradition Acts, 1870[1] and 1873, consequent on a request for extradition by the Norwegian Government on the ground of the alleged murder of Sigurd Aas on board the

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[1] Extradition Act, 1870, s. 25: "For the purposes of this Act, every "colony, dependency, and constituent "part of a foreign state, and every "vessel of that state, shall (except "where expressly mentioned as distinct in this Act) be deemed to be "within the jurisdiction of and to be "part of such foreign state."

Norwegian motor tanker *Vanja.* The applicant claimed that the committal was unlawful on the ground that there was no evidence before the magistrate as to the position of the ship at the time of the alleged crime and that, accordingly, it was not proved that the alleged crime was committed within the territory of the Kingdom of Norway as provided by the Treaty set out in an Order in Council dated September 30, 1873.[2]

Further, that, in any event, a Norwegian ship was not part of the territory of Norway and that the alleged crime was not therefore extraditable under the Treaty.

Leonard Caplan Q.C. and *Lawrence Verney* for the applicant.
Sir Frank Soskice Q.C. and *Quentin Edwards* for the Norwegian Government.
R. E. Seaton for the Governor of Brixton Prison.

Counsel for the applicant took the preliminary point that the Norwegian Government had no locus standi before the court.

Caplan Q.C. It was decided by Piggott C.J. in *In re Li Yu Mui*,[3] a decision in Hong Kong, that a power seeking extradition had no locus standi in habeas corpus proceedings. Having made a request for extradition its power ended and the sole party concerned is the British Government which is seeking to perform its obligations under its treaty with Norway and to justify before the courts the detention of the applicant. The only person to whom the writ was directed was the Governor, it was not served on the Norwegian Government, the affidavit of the applicant was merely sent to them as a matter of courtesy. [*In re Wong Ka Cheong*[4] was also referred to.]

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[2] Order in Council, dated September 30, 1873 (Sweden and Norway), Art. I: "The high contracting parties engage to deliver up to each "other those persons who, being "accused or convicted of a crime committed in the territory of the one "party, shall be found within the "territory of the other party, under "the circumstances and conditions "stated in the present Treaty."

Art. II: "The crimes for which "extradition is to be granted are the "following:

"1. Murder . . . or attempt to "murder. . . . 16. Sinking or destroying a vessel at sea, or attempting to "do so. 17. Assaults on board a ship "on the high seas, with intent to "destroy life or to do grievous bodily "harm. 18. Revolt, or conspiracy to "revolt, by two or more persons on "board a ship on the high seas "against the authority of the master; "except, as regards Norway, conspiracy to revolt."

Order in Council directing that the Extradition Acts shall apply in the case of the Kingdom of Norway. 1907, No. 545.

[3] (1910) 5 Hong Kong L.R. 227.

[4] (1905) 1 Hong Kong L.R. 1.

Sir Frank Soskice Q.C. R.S.C., Ord. 59, r. 17, makes it clear that the writ may be served on any person as the court may direct. The court is asked to direct that notice should be served on the Norwegian Government. The controversy was between the applicant and that government. In *Reg.* v. *Governor of Brixton Prison, ex parte Kolczynski*[5] Lord Goddard C.J., in granting habeas corpus, commented that the Polish Government in that case were not represented and could not therefore complain of the result, which was authority for the presence of a foreign government in such proceedings. It is understood that foreign governments are habitually present in court in these proceedings. If Piggott C.J. is right, all these appearances are contrary to law. [Reference was made to *In re Guerin.*[6]]

R. E. Seaton addressed the court in support of the presence of the Norwegian Government.

LORD PARKER C.J. On this preliminary point Mr. Caplan raised a matter of principle, namely, whether on an application such as this the requisitioning government is entitled to be heard. We, however, find it unnecessary in the present case to decide that point of principle. We think that under R.S.C., Ord. 59, r. 17, the court has power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning government so that the court can have the benefit of their views. We think that in the present case it would have been proper and convenient to give such a direction and though no direction was in fact given, Sir Frank is here representing the Norwegian Government, and we will hear him should the occasion arise.

The court then heard argument on the main issue.

Caplan Q.C. The applicant is wrongfully detained because it was not proved before the chief magistrate that the alleged crime was committed within Norwegian territory as required by the Treaty of 1873. In construing the meaning of "territory," the Extradition Act, 1870, cannot be used to extend the terms of the Treaty: see *per* Cockburn C.J. in *Reg.* v. *Wilson.*[7] The bargain between two countries cannot be extended by reference to the Act. "Territory" is not equivalent to jurisdiction. One cannot speak of concurrent territory although one can speak of

[5] [1955] 1 Q.B. 540, 550.

[6] (1888) 58 L.J.M.C. 42.

[7] (1877) 3 Q.B.D. 42, 45.

concurrent jurisdiction. Territory means a fixed area of the globe consisting of land and adjacent territorial waters as agreed by the contracting parties. A ship is not " territory." It is true that section 25 of the Act of 1870 states: " For the purposes of this " Act, every colony, dependency, and constituent part of a foreign " state, and every vessel of that state, shall . . . be deemed to " be within the jurisdiction of and to be part of such foreign " state." But that section was not intended to extend the terms of the Treaty. The section had to be drawn in the widest terms to cover treaties drafted in wide terms. The Treaty falls to be construed in accordance with its own terms as agreed to between the high contracting parties. [*In re Windsor*,[8] *Reg.* v. *Jamieson*[9] and Maxwell on Interpretation of Statutes, 10th ed., p. 148, were referred to.]

Assuming that the Treaty is not to be construed in its ordinary sense, but has an extended meaning having regard to section 25, then it is contended, alternatively, that " territory " cannot cover a ship in the territorial waters of a third power. The question here is not in relation to matters in the territorial waters of this country, but in those of some third power. It cannot be assumed that an English statute is presuming to legislate in regard to something which takes place in the territorial waters of a third country. Assume a situation where an Italian ship is in New York Harbour and a murder takes place; that when the ship reaches this country the Italian Government asks for extradition, and we agree to their request. The United States then asks for extradition and we say that we have extradited the accused to Italy. The United States can say: " You have dealt with him " as if he was in Italian territory for a crime committed in United " States' territory." That is the situation that is likely to arise if one is going to construe section 25 as legislating within the territorial limits of some third power. *Wildenhus's Case*[10] indicates the position in so far as a murder committed on a foreign ship in New York Harbour is concerned. If section 25 could be taken to say that a ship of country A in the territory of country B is nevertheless in country A, that would be contrary to international comity. In accordance with international law the words in section 25 must be taken to be qualified by the addition of the

[8] (1865) 6 B. & S. 522.

[9] [1896] 2 Q.B. 425.

[10] (1886) 120 U.S. 1.

words "except when within the territory of some other country." Section 25 cannot be used to extend the terms of the Treaty, but if it can, then international law requires that the words of the section must be taken with the limitation "except when within "the territory of some other country."

It is a recognized principle of international law that murder, when committed on board a foreign ship in the territorial waters of a third power, is a matter on which the local authorities would often wish to exercise their jurisdiction. However, the question here is whether section 25 is to be construed so as to deem "territorial waters" of another power to be within the territorial waters of Norway. That is a necessary construction if it is to be said that the section applies to ships of Norway while they are sailing in the territorial waters of another State. Since the evidence here does not show that the alleged crime took place within the area covered by the Treaty, the order was made without jurisdiction. "High seas" means low water mark to low water mark. The most expanded meaning of "territory" of a country can only take it up to, but not within, the territorial waters of another country. On the depositions it is not proved that the alleged crime took place within the territory of Norway even using the expanded meaning of the word "territory."

Sir Frank Soskice Q.C. was not required to argue on the first submission.

The proposition is that "territory" as used in the Treaty includes a Norwegian ship, subject to this, that it does not include a Norwegian ship within the territorial waters of a third power, and there is not sufficient evidence before the magistrate to say whether this ship was within the territorial waters of a third power when this crime was alleged to have been committed. Here the procedure laid down by the Act of 1870 was precisely followed. By section 6 of the Act: "Where this Act applies in "the case of any foreign state, every fugitive criminal of that "state who is suspected of being in any part of H.M. Dominions "shall be liable to be [extradited]." All that the magistrate had to decide was whether the person before him was a fugitive criminal accused of an extradition crime. Having been accused of an extradition crime, the magistrate must decide whether there was evidence to prove that the act complained of was committed. He only needs to be satisfied that there is a prima facie case. On the authorities it would seem that a Norwegian ship is still Norwegian territory even though it is in the waters of a third power. There might be concurrent jurisdiction, but the Norwegian jurisdiction is not ousted. Here the applicant was accused of the offence on a Norwegian ship on the high seas, and the magistrate had to decide whether the evidence established a prima facie case of murder if the act had been committed in this country, and also he had to be satisfied that the applicant was a fugitive criminal. [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 16, p. 1201.] The fact that there might be competing jurisdictions does not matter.

Caplan Q.C. replied.

LORD PARKER C.J. In these proceedings Mr. Caplan moves on behalf of Onofrio Minervini, an Italian subject, for a writ of habeas corpus. The applicant is now detained in Brixton Prison on an order of the chief magistrate dated August 25 committing him to Brixton to abide an order of extradition made by the Secretary of State.

The matter arises in this way: Apparently this man was a seaman on the Norwegian motor tanker *Vanja*, and he is accused of having on July 20, 1958, murdered one Sigurd Aas on board that vessel. There was no specific evidence as to the geographical position of the vessel at the time when this alleged murder is said to have taken place. All that we know is that it was some six days' steaming from a British port. The extradition proceedings were started as the result of a request by the Government of the Kingdom of Norway under whose flag the *Vanja* was and evidence was produced to the chief magistrate and he committed the applicant to Brixton.

Mr. Caplan has raised two points in a very careful and ingenious argument. The first one is this: He says that before the chief magistrate could have jurisdiction he must be satisfied by evidence which, if true, shows that the applicant was accused of an extradition crime, and for that purpose Mr. Caplan says that you must look at the Treaty and see if the evidence before the chief magistrate brings the case within the Treaty. The Treaty in question here was one made between Her Majesty Queen Victoria and the Governments of Sweden and Norway dated June 26, 1873, and pursuant to the Extradition Act, 1870, this Treaty was made the subject of an Order in Council dated September 30, 1873, applying to it the provisions of the Act of 1870. In 1907 there was a further Order in Council applying the provisions of that

Treaty of June, 1873, with slight alterations, which are immaterial, to the Kingdom of Norway alone.

By article 1 of the Treaty of June, 1873, it was provided: "The high contracting parties engage to deliver up to each "other those persons who, being accused or convicted of a crime "committed in the territory of the one party, shall be found "within the territory of the other party, under the circumstances "and conditions stated in the present treaty." Mr. Caplan says that of course in the ordinary way "territory" and "juris-"diction" are two completely separate notions. "Territory" he would define as an area of the globe consisting of land with, he admits, the territorial waters adjoining it. That being so, he says here that a vessel on the high seas cannot be in any sense territory, at any rate if the ship is outside territorial waters. The difficulty in his way here is that, when one goes to article 2 and looks at the list of the crimes which shall be treated as extradition crimes, one finds under paragraph 16: "Sinking or "destroying a vessel at sea or attempting to do so. 17. Assaults "on board a ship on the high seas, with intent to destroy life "or to do grievous bodily harm. 18. Revolt, or conspiracy to "revolt, by two or more persons on board a ship on the high "seas against the authority of the master." True, in general, one would not construe article 1 or extend the ordinary meaning of article 1 by reference to article 2 if it could be avoided, and he says there is no real conflict between article 1 and article 2. Paragraphs 16, 17 and 18 can, he contends, be treated as referring to offences on vessels while within the territorial waters of Norway because "high seas" in its ordinary meaning means high seas from low-water mark and therefore would include territorial waters. It seems to me that to read the provisions in that way is just nonsense. It is absurd to think that extradition proceedings will lie if a murder is committed just inside territorial waters and will not lie if it is alleged to have been committed just outside territorial waters. This Treaty is not treating "territory" in its strict sense, but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the Treaty. Indeed, it is to be observed that in many of these treaties reference is made not to territory but to jurisdiction, and, in my view, in this Treaty "territory" is equivalent to jurisdiction. It is also relevant, I think, in this connexion to consider the terms of the Extradition Act, 1870. Mr. Caplan says, quite rightly, that you cannot enlarge the scope of the Treaty by looking at the Act. With that I entirely agree, but in construing the words of the Treaty one is entitled to look at the Act itself. After all, the two contracting parties in 1873 must have had in mind the Act of 1870 and the fact that an Order in Council would be made referring to the Treaty and applying to it the provisions of the Act. By section 25 it is provided: "For the purposes of this Act, every colony, dependency, and constituent part of a foreign state, and every "vessel of that state, shall (except where expressly mentioned "as distinct in this Act) be deemed to be within the jurisdiction "of and to be part of such foreign state." That, no doubt, is a provision for interpreting the Act. It begins: "For the "purposes of this Act," but nevertheless it seems to me a provision which one cannot ignore when one is considering the meaning of the Treaty which was to be the subject of an Order in Council applying the provisions of the Act. In my view Mr. Caplan's first argument fails.

The second way in which he puts the case is this: Assuming he is wrong and "territory" must be given some meaning more than its ordinary meaning, yet it is impossible to say that it covers a ship at sea when it is within the territorial waters of a third power because, he says, that would be a gross breach of international comity; it would be legislating in respect of foreign territory and also deeming something which was within that foreign territory to be the territory of a foreign country. In my view, it is quite unnecessary here to consider what is the true position of a ship; whether the country whose flag is flown merely has jurisdiction over the ship and those on board or whether it is to be treated for certain purposes as the territory of that power. I find it unnecessary to go into those matters because if I am right in saying that "territory" in article 1 of the Treaty is equivalent to "jurisdiction," then assuming that the ship was at the time of the alleged murder within the territory of a foreign power, it would be only a matter of competing jurisdiction, and no one suggests it is wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it matters not in this case whether the ship was in the middle of the North Sea, in the territorial waters of Norway or of this country or of any other power. The Norwegian Government had jurisdiction, and that is sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position

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of the vessel and he had jurisdiction to make the order which he did. I would dismiss this application.

CASSELS J. I agree.

STREATFEILD J. I also agree and have nothing to add to the judgment of my Lord.

Solicitors: *Crawley & de Reya; Director of Public Prosecutions; Neil Maclean & Co.*

J. D. P.

1958 *July* 29, 30; *Aug.* 20.

Lord Goddard C.J., Donovan and Ashworth JJ.

SMITH AND OTHERS v. WYLES.

Gaming—Lottery—Licensed premises—Bowling club conducting small lottery in public house—Whether "gaming"—If so, whether such gaming on licensed premises protected by Acts of 1934 *and* 1956—*Betting and Lotteries Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *ss.* 21, 22—*Licensing Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 141—*Small Lotteries and Gaming Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 45), *ss.* 1, 4, 5 (1).

The licensee of a public house was also the president of a bowling club, which had its headquarters at the public house. The club, which was registered under the Small Lotteries and Gaming Act, 1956,[1] promoted a lottery in aid of its funds. Sales of tickets for

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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[1] Betting and Lotteries Act, 1934, s. 21: "Subject to the provisions of "this Part of this Act, all lotteries "are unlawful."

S. 22: "(1) Subject to the provi"sions of this section, every person "who in connexion with any lottery "promoted or proposed to be pro"moted either in Great Britain or "elsewhere— . . . (*f*) uses any pre"mises, or causes or knowingly "permits any premises to be used, for "purposes connected with the promo"tion or conduct of the lottery . . . "shall be guilty of an offence. (2) In "any proceedings instituted under the "preceding subsection it shall be a "defence to prove that the lottery to "which the proceedings relate was "such a lottery as is declared by any "subsequent section of this Part of "this Act not to be an unlawful "lottery, and that at the date of the "alleged offence the defendant be"lieved, and had reasonable ground "for believing, that none of the "conditions required by that section "to be observed in connexion with the "promotion and conduct of the lottery "had been broken."

Licensing Act, 1953, s. 141: "(1) "If the holder of a justices' licence "suffers any gaming or unlawful "game to be carried on in his pre"mises he shall be liable, on a first "conviction to a fine not exceeding "ten pounds, and on a subsequent "conviction to a fine not exceeding "twenty pounds."

Small Lotteries and Gaming Act, 1956, s. 1: "(1) This section applies "to any lottery . . . which is pro"moted in Great Britain on behalf of "a society registered by the local "authority under this Act, being a "society established and conducted the lottery were made in the bar of the public house, and two draws took place in the smoke room. The licensee knew and approved of the sales and the draws, which were made by releasing from a canister containing table tennis balls, two numbered balls. The holder of the ticket which had the two numbers corresponding with the tennis balls won a prize. The licensee was convicted under section 141 of the Licensing Act, 1953, of suffering gaming to take place on licensed premises, and the two officers of the club, who had sold the tickets for the draws, were convicted of aiding and abetting the commission of the offences:—

Held, (1) that the drawing of the lottery was gaming, and that continuous participation by the players was not an essential ingredient of gaming.

Morris v. *Baguley* (reported only in [1937] Brewing Trade Review L.R. 73) followed.

(2) That even though the lottery was a lawful one under the Small Lotteries and Gaming Act, 1956, the prohibition against gaming on licensed premises contained in section 141 of the Licensing Act, 1953, still remained and was not affected by the Act of 1956, and the licensee was rightly convicted.

Case stated by Birmingham stipendiary magistrate.

The following facts are taken from the judgment of Ashworth J.: By an information preferred by the prosecutor, Alfred Phillip Wyles, Albert Edward Smith, the licensee of the Deer's Leap public house, Kingstanding, Birmingham, was charged with two offences of suffering gaming to take place on licensed premises, contrary to section 141 of the Licensing Act, 1953. Walter

"wholly or mainly for one or more "of the following purposes, that is to "say—(*a*) charitable purposes; (*b*) "participation in or support of athletic "sports or games or cultural activi"ties; (*c*) purposes not described in "the foregoing paragraphs, and not "being purposes of private gain or "purposes of any commercial under"taking, and is so promoted for "raising money to be applied for "purposes of the society. (2) A "lottery to which this section applies "shall be deemed not to be an "unlawful lottery but the following "conditions shall be observed in "connexion with the promotion and "conduct of the lottery. . . ."

S. 4: "(1) This section applies to "any entertainment promoted in "Great Britain for raising money to "be applied for purposes other than "purposes of private gain, being an "entertainment at which games of "chance or of chance and skill com"bined are played in accordance with "the following conditions . . . "(6) Nothing in this section shall be "construed as affecting the operation "of any of the following enactments, "that is to say—(*a*) section one "hundred and forty-one of the "Licensing Act, 1953 (which penalises "the holder of a justices' licence who "allows gaming or unlawful games "in his premises) . . ."

S. 5: "(1) The Betting and Lot"teries Act, 1934, shall have effect as "if sections one and four of this Act "were included in Part II of that "Act, and were so included after "section twenty-two of that Act "(which provides a defence in pro"ceedings under that section in "respect of lotteries regulated by any "subsequent section of the said "Part II)."

Thomas Barnes and Arthur Bishop were charged with aiding and abetting the commission of those offences.

The stipendiary magistrate found the following facts: The licensee was at all material times the president of the Deer's Leap Bowling Club; Barnes and Bishop were its vice-president and secretary respectively. The headquarters of the club were situate at the Deer's Leap public house. In October, 1957, the club was duly registered under the provisions of the Small Lotteries and Gaming Act, 1956, for the purpose of promoting a lottery in accordance with that Act. The three officers of the club were all men of excellent character and repute.

On November 22, 23 and 24, 1957, Barnes and Bishop sold a number of sixpenny tickets for a lottery promoted by the club; these sales took place in the bar of the Deer's Leap public house and the licensee saw and approved such sales. On the evening of November 24, 1957, a draw took place under the supervision of Barnes in the smoke room of the Deer's Leap, the method adopted involving the use of a canister containing table tennis balls and the release therefrom of two numbered table tennis balls. The holder of the lottery ticket, who had selected upon purchase the combination of two numbers which corresponded with those upon the two balls released from the canister, was entitled to a prize.

On November 30, 1957, Barnes and Bishop again sold tickets for a lottery promoted by the club and a draw was made on December 1, 1957, in the above-mentioned manner. The licensee knew and approved of the draw taking place. Each of the two lotteries was conducted by Barnes and Bishop on behalf of the club and in aid of the club funds.

It was contended for the licensee that on the facts the events which took place at the Deer's Leap public house could not properly be regarded as gaming; or alternatively, that even if the holding of the lottery did amount to gaming, the combined effect of the Betting and Lotteries Act, 1934, and the Act of 1956 was impliedly to repeal section 141 of the Licensing Act, 1953, by rendering such gaming when it occurred on licensed premises lawful.

It was contended for the prosecutor that the drawing of the lottery at the Deer's Leap public house was gaming, and that section 141 of the Licensing Act, 1953, had not been affected by the Act of 1956 or the combined effect of the Acts of 1934 and 1956.

The magistrate was of the opinion that what took place in this case, whether it was called a lottery or a sweepstake or was regarded as more analogous to such a game as roulette, where the player selects the number he wishes to back, was undoubtedly gaming.

The licensee was accordingly convicted of suffering gaming on licensed premises contrary to section 141 of the Licensing Act, 1953, and Barnes and Bishop were convicted of aiding and abetting the same.

They appealed by way of case stated.

Sir Frank Soskice Q.C. and *Stephen Brown* for the appellants. The first question is whether the drawing of a lottery is gaming, which is generally understood to be a form of play; it involves a continuous process of playing; that is the meaning which should be given to it in section 141 of the Licensing Act, 1953. A lottery carried on over a series of days is a discontinuous process. *Morris* v. *Baguley* [2] is said to be a decision against the appellants' contention. That case is one of doubtful authority, and does not appear to have been reported by a member of the Bar. In that case there was an appeal against a decision of the Altrincham justices that a licensee, who permitted the drawing of a football sweep on his premises, the tickets for which had been sold in an adjoining brickyard, had not suffered gaming on his premises within section 79 of the Licensing (Consolidation) Act, 1910—the immediate predecessor of section 141 of the Act of 1953. The licensee did not appear on the appeal; the Divisional Court held that the drawing of the lottery was gaming and remitted the case with a direction to convict. The judgment of the court as reported consists of five lines, and its reasoning is not clear. The licensee was absent at the time of the draw, and it may be that the primary question was whether it could be said that, in the absence of the licensee, he suffered the gaming to take place. For the reasons given in *Police Authority for Huddersfield* v. *Watson* [3] that case does not bind the court, and there are other cases which imply the contrary view—that a lottery is not gaming. *Morris* v. *Baguley* [4] was given per incuriam, and this court is not bound by the unauthenticated report of it.

Apart from *Morris* v. *Baguley*,[5] cases trace the meaning of gaming back to the Alehouse Act, 1848, and it involves the concept of continuous play. There was no evidence in the present case that the purchaser of a lottery ticket revolved the canister or did anything in the nature of play; there was simply the purchase of a chance in a lottery. In *Ankers* v. *Bartlett*[6]—a case of an automatic machine on licensed premises—the licensee was convicted under the Metropolitan Police Act, 1839, of suffering gaming on licensed premises. But in that case the customers played with the machine. *Daniels* v. *Pinks*[7] concerned the installation of a slot machine in a club; it was argued unsuccessfully[8] that the manipulation of the machine was an essential ingredient of gaming in a common gaming house. [Reference was also made to *Davis* v. *Parker*,[9] *Fielding* v. *Turner*,[10] *Reg.* v. *Ashton*[11] and *Hardwick* v. *Lane*.[12]] In *Bew* v. *Harston*,[13] Cockburn C.J., who doubted whether a game of darts played on licensed premises for money was "gaming" within the Licensing Act, 1872, said[14]: "I am inclined to think that the term "'gaming' implies something which in its nature depends on "chance, or in which chance is an element." In *Dyson* v. *Mason*,[15] Wills J. said[16]: "It seems to me to have been held, "and rightly held, that playing any game for money is gaming." In *Lockwood* v. *Cooper*,[17] Lord Alverstone C.J. defined gaming in this way[18]: "To amount to gaming the game played must "involve the element of wagering—that is to say, each of the "players must have a chance of losing as well as of winning." *Welton* v. *Ruffles*[19] was a case of a bowling contest in which the prize was a kettle, and the licensee was convicted of suffering gaming on licensed premises. The language of the court there showed how "game" is used in all these cases—namely, that of playing for money. It was held in *Keep* v. *Stevens*[20] that betting on horses was not gaming. There had to be a limit on the scope of gaming. Lord Alverstone C.J., after referring to cases of betting offences under the Betting Act, 1853, said[21]: "In these cases it has never been suggested that allowing a bet "to be made is gaming." Betting is a concept different from that of a lottery, but both betting and lotteries are different concepts from gaming.

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[2] [1937] Brewing Trade Review L.R. 73.

[3] [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[4] [1937] Brewing Trade Review L.R. 73.

[5] Ibid.

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[6] [1936] 1 K.B. 47.

[7] [1931] 1 K.B. 374; 47 T.L.R. 166.

[8] [1931] 1 K.B. 374, 383.

[9] [1931] 2 K.B. 210; 47 T.L.R. 418.

[10] [1903] 1 K.B. 867; 19 T.L.R. 404.

[11] (1852) 1 E. & B. 286.

[12] [1904] 1 K.B. 204; 20 T.L.R. 87.

[13] (1878) 3 Q.B.D. 454.

[14] Ibid. 456.

[15] (1882) 22 Q.B.D. 351; 5 T.L.R. 231.

[16] 22 Q.B.D. 351, 356.

[17] [1903] 2 K.B. 428; 72 L.J.K.B. 690.

[18] [1903] 2 K.B. 428, 431.

[19] [1920] 1 K.B. 226.

[20] (1909) 100 L.T. 491.

[21] Ibid. 492.

Even if the drawing of the lottery was gaming, it has been legalized by the Act of 1956. Reading section 22 of the Betting and Lotteries Act, 1934, into the Act of 1956, it is clear that section 141 of the Act of 1953 has been amended. Section 4 of the Act of 1956, which legalizes certain small gaming parties, by subsection (6) (*a*) preserves section 141 of the 1953 Act in terms. The result is that small gaming parties are still prohibited on licensed premises. But nothing in section 1 of the Act of 1956 continues the Act of 1953 in relation to lotteries. Where, therefore, a proceeding constitutes gaming and a lottery, there is no offence under section 22 (1) (*b*) of the Act of 1934 if it is a lottery conducted under the Act of 1956, because of the defence given by section 22 (2) of the Act of 1934 to lotteries legalized by that Act or the Act of 1956. Lotteries under the Act of 1956 are incorporated into the Act of 1934 for the purpose of giving them the defence provided by section 22 (2) of the Act of 1934: see section 5 (1) of the 1956 Act.

[ASHWORTH J. There may be a defence to proceedings under the Act of 1934 given by section 22 (2) of that Act. It does not follow that there is a defence to proceedings under the Act of 1953.]

The Act of 1953 has been impliedly overruled. Unless a group of statutes clearly create an offence, one is in the area of permissible constructional doubt.

B. S. Wingate-Saul for the prosecutor. Certain types of lottery are not gaming; there can be lotteries which are also gaming; lotteries and gaming are two distinct things, though one proceeding may well be both. Section 4 of the Act of 1956 was not dealing with gaming as such, but with a limited form of gaming—entertainments at which a game is played. It is not a section dealing with gaming generally. Section 1 of the Act of 1956 was dealing with lotteries. No one could imagine that it dealt with licensed premises. The section was only dealing with activities. Section 4 was dealing with premises on which activities take place, and in subsection (2) a house shall not be deemed a common gaming house because of a small gaming party legalized by section 4. The saving clause for section 141 of the Act of 1953 put in section 4 (6) of the Act of 1956 was because of the layout of the section and was inserted ex abundanti cautela. But it cannot be that because there is an express saving of section 141 of the Act of 1953—which itself makes illegal an activity on certain premises—in a section of the Act of 1956 concerned with the premises on which activities take place, there must be a repeal of section 141 in section 1 of the Act of 1956 when section 1 is dealing with activities, and not with premises.

Section 22 (2) of the Act of 1934 only relates to proceedings under that Act. There are many activities which are not generally unlawful but which become so if conducted in public houses. There is nothing unlawful in giving beer to a 15-year-old boy; but if given to him in a public house, the licensee is guilty of an offence. The activity described in section 1 of the Act of 1956 is not unlawful in itself; but that does not give it immunity from special restrictions affecting particular premises. If the smoking of hemp be declared not unlawful, that does not mean that it is lawful to smoke it in a non-smoking compartment of a train, or down a coalmine if smoking is there prohibited. If the charge laid relates to conducting a lottery and is for using premises contrary to section 22 (1) (*f*), there can be no conviction if the lottery is exempt under the Act of 1956. But if a licensee is charged under section 141, not with running a lottery but with suffering gaming, he would be guilty of an offence.

[Donovan J. So far as the Act of 1956 is concerned, the Licensing Act, 1953, is paramount.]

When the charge is under section 141 of the Act of 1953, section 22 of the Act of 1934 does not fall to be considered. *Morris* v. *Baguley*[22] decides that the particular activity with which the appellants were charged was gaming. That case binds this court. It does not come within any of the exceptions laid down in *Police Authority for Huddersfield* v. *Watson.*[23] There is no conflicting decision; there is no House of Lords case inconsistent with it, nor is there any other case inconsistent with it. Nor was it given per incuriam; a decision is per incuriam when a relevant case or statute is not brought to the attention of the court. The Act of 1956 does not affect the meaning to be given to gaming, and there is no essential difference between the Licensing (Consolidation) Act, 1910, and the Licensing Act, 1953.

[Lord Goddard C.J. You need not trouble about the argument that gaming requires continuous participation.]

Section 141 of the Act of 1953 was re-enacting earlier sections to the same effect. This type of provision has been in force for a hundred years, and the policy behind it is to discourage money gained by gaming being spent on drink. It would be remarkable if Parliament by a side-wind in the Act of 1956 changed that policy and allowed gaming in licensed premises if it took the form of a lottery. If that had been Parliament's intention, it could have been clearly stated.

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[22] [1937] Brewing Trade Review L.R. 73.

[23] [1947] K.B. 847.

Sir Frank Soskice Q.C. in reply. It would be an absurd situation that if a licensee uses his premises for a lottery, he has a defence under section 22 (2) of the Act of 1934, whereas if he suffers them to be so used, he has no defence.

[DONOVAN J. He has a defence under section 22 provided section 141 of the Act of 1953 is not paramount.]

The Act of 1956 impliedly alters the Act of 1953. *Morris* v. *Baguley* [24] may have decided no more than that a sweepstake is an unlawful lottery, and that, because it is an unlawful lottery, it is gaming. The court was not there concerned with a lawful lottery. It is an inadequate report of a per incuriam case, where the court's reasons cannot be clearly known because the contentions put before the court are not known. In any event, it is distinguishable because it was only concerned with an unlawful lottery, whereas here the lottery is one legalized by the Act of 1956, which altered the law.

Cur. adv. vult.

LORD GODDARD C.J. Ashworth J. will deliver the first judgment.

ASHWORTH J. read the following judgment in which he stated the facts and continued: The first of the submissions made on behalf of the appellants involves the problem of what is meant by gaming. There appears to be no statutory definition of the word, and although there are many reported cases in which the meaning of the word has been considered, I am not for my part satisfied that there is to be found in any of them a definition which can be applied generally. For the appellants, Sir Frank Soskice contended that gaming involves something in the nature of a game in which the players not only participate but participate continuously: accordingly, it was submitted that a person who buys a lottery ticket on a given day when the draw is not due to take place until one or more days have elapsed and the purchaser of the ticket may well be absent, is not gaming. In my judgment, this contention places too restricted a meaning upon the word "gaming." Undoubtedly some games involve gaming, but it does not follow that gaming involves a game. Moreover, I do not think that the time factor enters into the problem in the way suggested on behalf of the appellants.

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[24] [1937] Brewing Trade Review L.R. 73.

It was conceded that persons who play roulette are gaming; they are staking their money in a proceeding the outcome of which is dependent merely upon chance. Like the stipendiary magistrate, I take the view that there is no difference in principle between that form of proceeding and the one involved in the present case, where the stake is represented by a ticket and the outcome is dependent on two numbered balls released from a canister, and not one ball spun on a roulette board.

It is true that in places the relevant statutes appear to draw a distinction between lotteries and gaming: for example, in section 24 (1) (*a*) of the Act of 1934 reference is made to "purposes not connected with gaming, wagering or lotteries." Moreover, in the Act of 1956, lotteries and gaming parties are treated separately. But in my view these provisions do not justify the inference that lotteries and gaming are, so to speak, mutually exclusive terms. The truth is that some lotteries involve gaming and some do not, just as some gaming involves a lottery and some does not. The facts of each case relating to a lottery require separate consideration in order to determine whether that lottery constitutes gaming or not.

In the course of the argument reference was made to *Morris* v. *Baguley*,[1] a decision of this court given in the year 1937, in which the problem now under consideration was raised. There is no properly authenticated report of the decision, but it is mentioned in the Brewing Trade Review law reports for that year. The original case stated was obtained from the Crown Office and from that document it was clear that the question raised for the consideration of this court was whether the drawing of a sweepstake constituted gaming. The drawing took place on licensed premises and the licensee was charged with having suffered gaming to be carried on upon his licensed premises contrary to section 79 of the Licensing (Consolidation) Act, 1910. The justices held that gaming had not taken place and the informant appealed. It was held by this court that gaming had in fact been suffered on licensed premises. It is only right to add that the respondent licensee was not represented at the hearing of the appeal.

On the question, therefore, whether the drawing of a sweepstake or lottery constitutes gaming, that case appears to be a decision directly in favour of the present respondent, and Sir

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[1] [1937] Brewing Trade Review L.R. 73.

Frank Soskice sought to avoid its consequences by contending that it was not binding on this court for one of the reasons given in *Young* v. *Bristol Aeroplane Co. Ltd.*,[2] and applied in *Police Authority for Huddersfield* v. *Watson*,[3] namely, that it was given per incuriam. I can see no reason why the decision in *Morris* v. *Baguley*[4] should be so regarded, and, quite apart from any views of my own, I should feel bound by it. But as already indicated, I have come to the same conclusion independently, and in my view the first submission of the appellants fails.

The second submission involves consideration of the relevant statutory provisions. It is convenient to start with the Act of 1934. Section 21 provides that subject to the provisions of Part II of the Act all lotteries are unlawful. Section 22 (1) contains a list of offences in connexion with lotteries of which paragraph (*f*) is of particular relevance—" uses any premises or causes or knowingly " permits any premises to be used, for purposes connected with " the promotion or conduct of the lottery." Section 22 (2) provides that in any proceedings instituted under the preceding subsection it shall be a defence to prove that the lottery was such a lottery as is declared by any subsequent section of Part II not to be an unlawful lottery. Sections 23 and 24 each contain provisions whereby lotteries falling within their limited scope are deemed not to be unlawful lotteries. I shall refer to such lotteries as exempted lotteries.

It may be noted that the Act of 1934 contained no specific provision relating to licensed premises. Accordingly, a licensee on whose premises a lottery was conducted might be charged with a contravention of section 22 (1) (*f*), unless the lottery was an exempted lottery. Further, if the lottery involved gaming and was conducted on his premises, he might also be charged with a contravention of the Licensing (Consolidation) Act, 1910, as was in fact done in *Morris* v. *Baguley*.[4]

The next relevant Act is the Licensing Act, 1953, but in my view there is no material difference between section 141 of that Act and section 79 of the Act of 1910, and I need not refer to the terms of either section in detail.

The Act of 1956 is, however, of great importance. By virtue of section 1 certain small lotteries conducted for charitable, sporting or other purposes are deemed not to be unlawful lotteries, providing certain conditions are observed. Section 4 deals with a limited class of entertainments, at which games of chance or of chance and skill combined are played, and by subsection (2) provides that places where such entertainments are held shall not be deemed to be common gaming houses. Subsection (3) provides that a game played at an entertainment to which the section applies in accordance with the prescribed conditions shall not be deemed to be an unlawful lottery.

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[2] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[3] [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[4] [1937] Brewing Trade Review L.R. 73.

If one analyses the position at this stage, the result is that there have been two additions to the pair of exempted lotteries mentioned in sections 23 and 24 of the Act of 1934. These additions are a small lottery falling within section 1 of the Act of 1956 and a game played at an entertainment falling within section 4. But a person who used premises or permitted premises to be used for either of these additional lotteries would still have been liable to prosecution for an offence under section 22 (1) (*f*) of the Act of 1934, as the defence provided by section 22 (2) is only applicable in the case of lotteries declared not to be unlawful by any subsequent section in Part II of that Act. In order to meet this situation the draftsman provided a somewhat oblique remedy by including in section 5 of the Act of 1956 a provision that the Act of 1934 should have effect as if sections 1 and 4 of the Act of 1956 were included in Part II of the Act of 1934. The defence provided by section 22 (2) of the Act of 1934 is therefore available in the case of the additional exempted lotteries.

It is now necessary to consider the effect of subsection 6 of section 4 of the Act of 1956 which provides: "Nothing in this "section shall be construed as affecting the operation of any of "the following enactments, that is to say:—(*a*) section 141 of "the Licensing Act, 1953." The inclusion of this provision in this section and the omission of any corresponding provision in section 1 of the Act of 1956 are the points upon which I have felt most doubt. If it was the intention of the legislature to maintain the full force and effect of section 141 in relation to exempted lotteries and to dispel any doubts as to its applicability, one might have supposed that the Act of 1956 would contain a separate section: "Nothing in this Act shall be construed as "affecting the operation of section 141." Furthermore, the explanation that subsection 6 was included in section 4 ex majore cautela is not very convincing since section 1 would appear to call for the same degree of caution. On the other hand, I find no less difficulty in accepting Sir Frank Soskice's contention that by implication section 141 is rendered inapplicable to lotteries falling within section 1 of the Act of 1956. The omission of any reference to section 141 in section 1 of the Act of 1956 may be said to afford some support for the contention that lotteries within section 1 do not involve gaming and therefore no reference to section 141 was called for, but I have already stated my conclusion that such lotteries may (and in the present case did) involve gaming. For my part I am not prepared to take the further step of deducing, from the omission of any reference to section 141 in section 1 of the Act of 1956, that section 141 ceased to apply to the gaming (if any) involved in a lottery under that section 1.

Although I do not feel confident on the point, I am inclined to think that the draftsman treated lotteries falling within section 1 of the Act of 1956 on the same basis as the lotteries exempted under sections 23 and 24 of the Act of 1934: no special reference to the provisions of the Licensing Act, 1910, had been thought necessary in regard to those exempted lotteries, and therefore none was required in respect of the lotteries exempted under section 1 of the Act of 1956, which are lotteries properly so called. On the other hand, section 4 was introducing something different, namely, the exemption of gaming parties which might or might not be lotteries, and in respect of these a reference to section 141 was thought to be necessary.

Whatever may be the true explanation, I am of opinion that once it is established that gaming is involved, a licensee cannot lawfully suffer it to take place upon his licensed premises. In my judgment, section 141 of the Licensing Act, 1953, was not affected by the Act of 1956, and accordingly this appeal should be dismissed.

Donovan J. has authorized me to say that he agrees with this judgment.

LORD GODDARD C.J. I agree that this appeal fails. I have come to this conclusion by a shorter route as in my opinion the only question that falls for decision is whether the conduct of a lottery is a form of gaming. If it is, in my opinion it cannot be conducted on licensed premises although it is one which otherwise would be exempted from penalties. The legislature has always been at pains to prohibit public houses being used for the purpose of gambling whether by betting or gaming, and in my opinion section 4 (6) of the Act of 1956 is intended to maintain this absolute prohibition, notwithstanding that a particular form of gaming for particular purposes is exempted from penalties if conducted elsewhere. Apart from authority, I think that participating in a lottery is gaming and I agree with the magistrate that it is analogous to a game of roulette. In the one case the player buys a numbered ticket which if drawn gains a prize, in the other he chooses a number on a board and if the ball stops at that number he wins. If the latter is gaming, and no one could argue the contrary, I cannot see why the former is not. Moreover, the decision in *Morris* v. *Baguley* [5] is directly in point; the short report, to which our attention was called, does not appear to have been reported by a member of the Bar and, apparently, it was only argued on one side. But we sent for the special case, from which it is clear that the only question submitted was whether the drawing of a lottery was gaming, and this court held that it was. Even if I did not agree with the decision, I should feel I was bound by it. That case was decided after the Act of 1934 had been passed, and in my opinion is conclusive, as indeed I understood Sir Frank Soskice to agree that it was, if we were of opinion that it was binding on us. I agree that the lottery with which this case is concerned falls within the exemptions conferred by the Act of 1956, but the prohibition of gaming on licensed premises still remains, so to gain immunity it must be conducted elsewhere. It is true that the Act deals with both lotteries and gaming, but that, I think, is because lotteries are only one form of gaming, carried out by the drawing of a numbered ticket, and of which a sweepstake is a common example; had Parliament intended to make so startling a departure from its previous policy as to allow lotteries of any description in public houses while still prohibiting other gaming, I should have expected some very clear words to effect such a change.

Before parting with this case I should like to say, as I have said on other occasions, that I think it is unfortunate that decisions of this court on matters relating to criminal law can never be the subject of appeal. I feel no doubt as to the correctness of the decision in *Morris* v. *Baguley*,[5] but supposing we had felt that it was wrong or at least open to question, we should none the less be bound by it. It does happen from time to time that this court have to follow a decision with which they find it difficult to agree, and if their decision were open to appeal both the instant case and that which it followed could be reviewed. I continue to hope that the time will come when by leave and subject perhaps to terms as to costs it will be possible to take either to the Court of Appeal or perhaps direct to the House of Lords a decision of this court, although it relates to a criminal cause or matter. The complexity of modern legislation I feel sure makes this desirable.

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[5] [1937] Brewing Trade Review L.R. 73.

Appeals dismissed.

Solicitors: *Field, Roscoe & Co. for Colin Langley & Smith, Birmingham; Sharpe, Pritchard & Co. for M. P. Pugh, Birmingham.*

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1958
Oct. 22.

Lord Parker C.J., Streatfeild and Diplock JJ.

Shop — Sunday closing — Exemption from — Retail shop carrying on several trades or businesses—Failure to display notice stating purpose for which shop open—Prosecution—Charge improperly laid—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 47, 50.

The shopkeeper of a general store was charged with an offence under section 50 of the Shops Act, 1950,[1] and the Shops Regulations, 1937 [2] (which now apply to the Act of 1950), by failing to display a notice stating the purpose for which the shop was open on Sunday. The justices took the view that the charge as laid showed no offence, and that the shopkeeper should have been charged under section 47 (which provides for the closing of every shop on Sunday except as otherwise provided). They accordingly dismissed the charge. On appeal by the prosecutor:—

Held, that section 50 could not, of itself, create an offence because it was a purely permissive section providing exemption in

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[1] Shops Act, 1950, s. 47: "Every "shop shall, save as otherwise pro- "vided . . . be closed for the serving "of customers on Sunday: . . ."

S. 50: "Where several trades or "businesses are carried on in the "same shop and any of those trades "or businesses consist only of trans- "actions of such a nature that, if "they were the only transactions "carried on in the shop, the pro- "visions of this Part of this Act "requiring the shop to be closed for "the serving of customers . . . [on] ". . . Sunday would not apply to the "shop, the shop may be kept open "for the whole or any part of Sun- "day, . . . for the purposes of those "transactions alone, subject, how- "ever, to such conditions as may be "prescribed."

S. 76 repealed, inter alia, the Shops (Sunday Trading Restriction) Act, 1936, and applied the Shops Regulations, 1937, to the Shops Act, 1950.

[2] Shops Regulations, 1937 (S.R. & O. 1937, No. 271), reg. (1): "The "conditions subject to which a shop ". . . to which section 4 of the Shops "(Sunday Trading Restriction) Act, "1936, . . . applies, may be kept "open in accordance with the provi- "sions of that section for the whole "or any part of Sunday, shall be as "follows—(*a*) during any time on "Sunday when the shop is open for "the serving of customers there shall "be exhibited . . . notices [stating "the purposes for which the shop is "open on Sunday]."

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certain circumstances from the prohibition contained in section 47; that section 47 was the governing section creating the offence, and therefore the justices had come to a correct decision in law and the appeal should be dismissed.

Case stated by East Ham justices.

On March 25, 1958, an information was preferred by Douglas George Tonkin, chief Shops Act inspector for the County Borough of East Ham, against the defendant, Bertie Raven, alleging that on Sunday, January 19, 1958, he, the occupier of a shop or place at which the retail trade or business of general stores was carried on, situated at 301, Church Road, E.12, within the district of the council, "did fail to comply with the provisions contained "in section 50 of the Shops Act, 1950, and regulations made "thereunder in that notices as required by section 50 . . . and "regulations . . . were not displayed stating the purpose for "which the shop was open, contrary to the said provisions of "the said Act." The defendant did not appear.

At the beginning of the proceedings the court had intimated to the prosecutor that, in their view, there appeared to be no offence known to the law disclosed in the summons and, accordingly, they adjourned the hearing sine die to give the prosecutor an opportunity to seek instructions in the matter. On the application of the prosecutor the matter was restored to the list for hearing a fortnight later. The defendant did not appear at the adjourned hearing.

It was contended by the prosecutor that section 50 of the Act created an offence; if a shopkeeper kept his shop open on a Sunday, and that shop carried on several trades, if a notice in the prescribed form was not exhibited, the shopkeeper was liable to be proceeded against for failing to display that notice under section 50 of the Act; and that the penalty for such an offence was to be found in section 59.

The justices were of opinion that if an offence was to be alleged it should be taken under section 47 of the Act, which prohibited the opening of a shop on Sundays with certain exceptions; if several trades were carried on in a shop and the occupier desired to remain open on a Sunday for the sale of any of the articles referred to in the Fifth Schedule he could do so only if a notice in the prescribed form were exhibited; section 50 of the Act was created in order to allow occupiers of shops carrying on a mixed trade and opening on a Sunday to do so, and was therefore an exempting section from prosecutions under section 47 provided such a notice was exhibited; if such a notice was not exhibited, then an offence was committed under section 47 of the Act. They accordingly dismissed the information. The prosecutor appealed.

Paul Wrightson for the prosecutor. The charge was properly laid under section 50. The Shops Act, 1950, is a consolidating Act. The original provisions for the closing of shops were contained in the Shops Act, 1912, under section 4 of which shops had to close for one half-day a week. Section 10 (1) of that Act exempted shops carrying on several trades or businesses from the provisions of section 4 provided that they exhibited certain notices. If the appropriate notices were not exhibited, the offence committed was against section 4 because that section contained the only penalty: see section 4 (7). In the Shops (Sunday Trading Restriction) Act, 1936, the general provision for Sunday closing was contained in section 1, and section 4 dealt with shops carrying on several trades or businesses in the same way that they had been dealt with by section 10 (1) of the Act of 1912. The exempting conditions, e.g., the exhibition of notices, were set out in the Shops Regulations, 1937. It is to be observed. however, that the Act of 1936 differed from the Act of 1912 because the penalty for failing to close was contained in a separate section and not in the general prohibition section. It is submitted, therefore, that, in relation to businesses covered by section 4, a failure to exhibit notices as required by the regulations was an offence under section 4, which specifically dealt with them, and not an offence under section 1.

In Part IV of the Shops Act, 1950, which contains the provisions for Sunday closing now in force, section 47 takes the place of section 1 of the Act of 1936. Shops carrying on several trades or businesses are dealt with by section 50, which is in exactly the same terms as section 4 of the earlier Act. There is a separate penalty section, namely, section 59. Under the present Act, therefore, the position is the same as it was under the Act of 1936, and the offence alleged to have been committed by the respondent was an offence against section 50 and not against section 47. The answer to a prosecution under section 47 would be that the shop was lawfully open on Sunday by virtue of section 50 because that section clearly provides that a shop of this nature may be open, subject to conditions; it cannot be said to be unlawfully open just because the occupier failed to exhibit a notice.

If the view of the justices is correct, the only offence which could be committed under Part IV of the Act would be an offence against section 47. If that were so, there could be no purpose in section 59, which provides a penalty for contravention of "any of the foregoing provisions of this Part of this Act." Admittedly section 47 contains the general prohibition, but there are other specific prohibitions contained in the sections following, and if any one of them is broken it is an offence against that particular section. Reliance is placed on the difference in the schemes of the Acts of 1912, 1936 and 1950. Before 1936 the justices' view must clearly have been right because there was no separate penalty section, but there must have been some purpose in making a separate penalty section in the later Acts. Since section 59 of the present Act applies to all the foregoing sections of Part IV it can only mean that those sections create a number of different offences. The appeal should be allowed. [Reference was made to *Waterman* v. *Wallasey Corporation*; *Hesketh* v. *Same*.[3]]

The respondent did not appear and was not represented.

LORD PARKER C.J. This is a case stated by justices for the County Borough of East Ham, before whom the defendant was charged with an offence against the Shops Act, 1950. The charge was in this form, that he, being "the occupier of a shop or place "at which the retail trade or business of general stores was "carried on, situated at 301, Church Road, E.12, within the "district of the council, did fail to comply with the provisions "contained in section 50 of the Shops Act, 1950, and regulations "made thereunder in that notices as required by section 50 of "the Shops Act, 1950, and regulations made thereunder were "not displayed stating the purpose for which the shop was open, "contrary to the said provisions of the said Act."

This is a case where one has the greatest sympathy with the justices. The defendant did not appear. There was no argument on his side, and they were faced with advice from their clerk that the charge disclosed no offence in law. The justices came to the conclusion that there was something in that advice and adjourned the hearing in order that the prosecutor might consider the matter. The matter was argued later and, in the end, the justices decided that the charge was wrongly laid and dismissed it. This is a highly technical point, but it may none the less be a good one. It depends on the true construction of certain sections of the Shops Act, 1950.

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[3] [1954] 1 W.L.R. 771; [1954] 2 All E.R. 187.

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[His Lordship read sections 47 and 50 of the Act, and continued:] For certain transactions a shop is entitled to remain open on Sunday. The type of transaction is set out in the Fifth Schedule. In the case of multiple businesses, if one of the several trades consists only of transactions which come within the Fifth Schedule, the shop may be kept open for those transactions alone, subject to certain conditions. These conditions were prescribed under the Shops (Sunday Trading Restriction) Act, 1936, and are to be found in the Shops Regulations, 1937. By section 76 of the Act of 1950 those regulations were continued and are the relevant regulations in the present case. They provide that as conditions of remaining open under section 50—originally it was section 4 of the Act of 1936—two conditions shall be fulfilled: (1) certain notices shall be exhibited, and (2) no goods shall be exhibited other than goods for the sale of which the shop can lawfully be kept open.

Finally, section 59 provides that " In the case of any contravention of any of the foregoing provisions of this Part of this Act, the occupier of the shop shall be liable to a fine . . . "—and a scale of fines is set out.

The short point in this case is whether the charge was properly laid as an offence against section 50 of the Act of 1950 and the regulations. The view which the justices took was that it should have been laid under section 47. The arguments are fairly evenly divided. Mr. Wrightson has referred to the Shops Act, 1912, where the equivalent to section 50 of the Act of 1950 was made an express proviso to section 4 (1). Section 4 of the Act of 1912 corresponded with the present section 47, and, by subsection (7), laid down the offence. In other words, under the original scheme of legislation one found in section 4 of the Act of 1912 a self-contained code of general prohibitions, the exemptions to them, and the penal provision. Mr. Wrightson argues that the present scheme is a different one. True, there may be offences against section 47 but, he argues, there may also be offences against the subsequent sections, particularly section 50. The contravention of those subsequent sections (including section 50) are themselves separate offences; and he relies in particular on the wording of section 59, namely, " In the case of any contravention of any of the foregoing provisions of this Part of this Act . . . "

Paying due regard to that, I find it nevertheless impossible to say that section 50 creates any offence at all. It is clear that it is merely a permissive section subject to certain conditions, and I cannot see how a permissive section can, of itself, create an offence. There must be some preceding section which does create the offence to which the permissive section is an exemption, and, despite the present lay-out of the Act of 1950, I am constrained to feel that the position is exactly the same as it would have been under the Act of 1912. Mr. Wrightson concedes that under that Act a charge would have to be preferred of an offence contrary to section 4, which is now section 47. I think that the justices properly applied their minds to this question and came to a correct decision in law, and I would dismiss this appeal.

STREATFEILD J. I agree. In my view the starting-point for the construction of this Act is the wording of section 47: "Every "shop shall, save as otherwise provided by this Part of this Act, "be closed for the serving of customers on Sunday:" that is to say, there is a complete embargo on the opening of any shop on Sundays unless it is otherwise provided. There is a proviso to section 47 where it is otherwise provided immediately, namely, shops which come within the Fifth Schedule are exempt from the provision of the section. One then passes to section 50 which, as my Lord has pointed out, is a purely permissive section, and upon the question of construction it is difficult to see how a permissive section can, in itself, create an offence. To my mind, section 50 means no more than this, that where several trades or businesses are carried on in the same shop, and any one of those trades consists only of transactions to which this Part of the Act would not apply, then the shop may obtain exemption provided it complies with the regulations. That simply creates another exception to section 47, which is the governing section creating the offence. It is quite true that the lay-out of the Act of 1950 is different from the Act of 1912, inasmuch as there is no penalty clause in section 47. That is reserved for section 59 which lays down certain penalties "in the case of any contravention of any "of the foregoing provisions of this Part of this Act." Mr. Wrightson submitted that there are no other sections to which that section could apply unless section 50 creates an offence as well as section 47. Without the matter having been fully argued I should be inclined to the view that section 53, which deals with occupiers of shops professing the Jewish faith, might in itself create a separate offence. Section 55 would clearly create a different offence, that of delivering goods to customers on occasions when the shop would not otherwise be open; and section 57, which deals with notices, might create a separate offence. Those are other instances of offences which are separate

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from section 47, and which are all collected together, so far as penalty is concerned, under section 59 of the Act.

I have come to the conclusion that the real offence, if any, which was committed here was that of remaining open on Sunday contrary to section 47 because, by reason of his failure to display the required notices—in other words, to observe the conditions laid down in the regulations—the defendant has not brought himself within the exception visualized by section 50. In my judgment, the justices were quite right in saying that the offence committed here, if any, was under section 47 rather than under section 50, and for those reasons I think this appeal should fail.

DIPLOCK J. For the reasons given by my Lords I agree.

Appeal dismissed.

Solicitor: *Sharpe, Pritchard & Co. for R. H. Buckley, Town Clerk, East Ham.*

E. M. W.

BAILEY *v.* AYR ENGINEERING AND CONSTRUCTIONAL CO. LTD. AND ANOTHER.

[1955 B. 1142.]

C. A.

1958
April 18.

Jenkins, Parker and Pearce L.JJ.

Building — Safety regulations — Falling material — Place of habitual employment—Electrician working in open shaft injured by part of shaft falling upon him—Meaning of "material"—Whether breach of regulations — Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 90 (1).
Causation—Breach of statutory duty.

Regulation 90 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, requires that any "place on the site of the "operations at which any person is habitually employed shall be "covered in such manner as to protect any person who is working "in that place from being struck by any falling material or "article."

The plaintiff, an apprentice electrician employed by the first defendants, was working in an open shaft in a block of flats, which were under construction, when he was struck and injured by a falling block of masonry forced out of the side of the shaft by a heavy piece of iron stair-rail which had got out of the control of workmen employed by the second defendants who were attempting to place it in position on the stairway. The plaintiff claimed against the first defendants, inter alia, that they were in breach of regulation 90 of the Building (Safety, Health and Welfare) Regulations, 1948:—

Held, (1) that the shaft in which the plaintiff was working at the time of the accident was an "habitual" or contemplated place of employment where men would work, and that, accordingly, regulation 90 was applicable to the place in question.

Kearns v. *Gee, Walker & Slater Ltd.* [1937] 1 K.B. 187; 53 T.L.R. 38; [1936] 3 All E.R. 151 applied.

But that (2) regulation 90 was designed to protect men working at sites where they habitually did work from falling materials and debris and not from a collapse of the structure itself, whether it be a chimney, a roof or (as in this case) part of a shaft; and that, although it could not be said that the first defendants were not in breach of the regulation at all, since it was their duty to put up some "umbrella," albeit only one designed to prevent materials, debris and tools from falling down, nevertheless it was not that breach which caused the injury to the plaintiff, because the injury was caused by the fall of a block of masonry which was not within the contemplation of the regulation, and, therefore, they were under no liability to the plaintiff.

Decision of Lloyd-Jacob J. reversed in part.

APPEAL from Lloyd-Jacob J. sitting as an additional judge of the Queen's Bench Division.

On June 16, 1954, the plaintiff, William Bailey, an apprentice electrician employed by the first defendants, Ayr Engineering & Constructional Co. Ltd., went with one Evans, who was in charge of him, to a large block of flats which were being erected at Highbury New Park, London, for the purpose of installing the electric supply wires.

There were a number of contractors on the site, and, amongst others, the first defendants, who were electrical engineers, and the second defendants, General Iron Foundry Co. Ltd., who were supplying and installing iron railings for the staircases.

The building in question was of some five storeys of which the brickwork had been almost entirely completed and the staircases erected. The staircases, which went from half-landing to half-landing, went round something like a brick chimney, into which there were openings at each half-landing. The object of this brick chimney was twofold: first that it should serve the purpose of a chute for the disposal by the tenants of the flats of their refuse, and this was to go down an earthenware pipe, access to which was obtained by means of a door at each half-landing. Behind the earthenware pipe, forming, as it were, the back part

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of this chimney, was an open shaft with an entrance at the bottom on the half-landing between the ground floor and the first floor. The back of this shaft was designed to carry up the electric supply wires, the gas piping, and the plumbing for the service of the different flats. At the material date, this chimney did not go completely up to the roof, as it was ultimately going to do, but went up to the fifth floor. It did not end flush with that fifth floor, but was built up rather like a parapet for a further 18 inches.

On the day in question the plaintiff entered the shaft through the opening on the half-landing between the ground floor and the first floor, and inserted a ladder and began to rawl-plug the interior of the shaft to carry up the conduit pipe. Evans, who apparently was a rather stout man, was unable to get into the shaft, and he remained outside giving directions. After some 20 minutes or half an hour had elapsed, the plaintiff was struck on his back by a large block of masonry, something like eight or 10 bricks still firmly joined together with cement, and in consequence suffered injuries.

It was later found that the cause of this fall was that three employees of the second defendants had meanwhile been taking up to the fifth floor a section of iron railings, to form part of the staircase railing. The section was some 2½ cwts. in weight and some 13 or 14 ft. long: what they did was to raise it outside the building by means of a pulley and bring it into the building on the fourth floor: then their intention was to manhandle it from the fourth floor on to the fifth floor, from which it was going to be erected. Apparently in the process of manhandling this object up the last flight of stairs they lost control (as the judge found) of this heavy piece of metal, and acting as a sort of battering ram it broke down the top of the shaft and this block of masonry thereby fell upon the plaintiff.

In those circumstances, the plaintiff brought these proceedings. He claimed against the first defendants, as his employers, that they had been guilty of a breach of their duty at common law, and also that they were in breach of a statutory duty under regulation 90 of the Building (Safety, Health and Welfare) Regulations, 1948. He also joined the second defendants, alleging that they had been guilty of a breach of their common law duty and also that they were in breach of regulation 94 of the regulations. Lloyd-Jacob J. awarded the plaintiff £573 1s. 9d. by way of damages. His Lordship found that the second defendants were guilty of negligence, but he also held that the first defendants were guilty both of a breach of their common law duty, and their statutory duty, and as between them and the second defendants, held them 30 per cent. to blame.

The first defendants appealed against the finding of liability to the plaintiff, and the second defendants appealed in regard to costs only as between themselves and the other defendants.

H. I. Nelson Q.C. and *R. E. Hopkins* for the first defendants. This shaft was not a place where persons were " habitually " employed " within the meaning of regulation 90 (1) of the Building (Safety, Health and Welfare) Regulations, 1948. [Reference was made to *Kearns* v. *Gee, Walker & Slater Ltd.*[1]] The reference to " any falling material or article " in that regulation is not to parts or a part of the building itself breaking off and falling down, but to loose material such as single bricks, and to objects such as tools. The regulation is not free from ambiguity, and, accordingly, since a breach of it involves penal consequences, the court, if there is a reasonable interpretation which will avoid the penalty, should adopt that construction and hold that there has been no breach of statutory duty by these defendants: see *per* Lord Macmillan and Lord Simonds in *London and North Eastern Railway Co.* v. *Berriman.*[2]

D. P. Croom-Johnson Q.C. and *John Hornsby* for the second defendants. Regulation 90 (1) is defining the place which requires protection and not primarily the class of workmen to be protected. " Habitually " is to be contrasted with " casually." It is to be remembered that this was a building site, a constant place of work. [Reference was made to *Kearns* v. *Gee, Walker & Slater Ltd.*[3]] The regulation contemplates that there will be a danger to persons from material falling on them in a place not where persons might casually be but where persons are likely to be " habitually." The place where the plaintiff was working—the place where he was " habitually employed "—was the bottom of the shaft, which was the most likely place in which he might be struck and, accordingly, a cover should have been provided above him.

" Material " in the regulation includes part of the structure. The words of the regulation are quite clear and are extremely wide, and there is no justification for placing a narrow construction on them. [Reference was made to *London and North Eastern Railway Co.* v. *Berriman.*[4]]

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[1] [1937] 1 K.B. 187, 192, 193.

[2] [1946] A.C. 278, 295, 312, 313.

[3] [1937] 1 K.B. 187.

[4] [1946] A.C. 278.

Nelson Q.C. in reply. It is to be observed that in regulation 94 express provision is made for safeguarding workmen from the collapse of the structure.

F. B. Purchas for the plaintiff.

JENKINS L.J. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. stated the facts and found that the first defendants were not in breach of their duty at common law, and continued: There remains the claim under regulation 90 (1). [His Lordship read it, and continued:] Although that regulation is by no means clearly worded, it has remained in that form since 1926, when it first appeared as paragraph 31 of the building regulations of that year, made then under the Factory and Workshop Act, 1901.

Two questions really arise on that regulation: one, whether the place where the plaintiff was working was a "place on the "site of the operations at which any person is habitually em-"ployed," and, secondly, whether this block of masonry which was broken off from the structure of the building can be said to be "any falling material or article" within that regulation. As regards the meaning of the word "habitually," the matter was considered by this court in *Kearns* v. *Gee, Walker & Slater Ltd.*,[1] when the court approached the matter on the basis that the regulation was defining the place, and not the person, which was to be protected; and the question here is not whether this plaintiff was "habitually employed" there but whether this was (if I may put it in this way) an "habitual" place of employment, or a contemplated place of employment, where men would work, not casually, but habitually. Looked at in that way, it is a question of degree, and I do not think that I would be prepared to differ from the judge, who held that, in the circumstances of this case, the place of work of the plaintiff was a place of work to which that regulation applied. After all, this shaft was intended to be used for electrical wires, gas piping, and water pipes, and that would entail the various trades concerned going, as part of their job, from time to time into the shaft to effect the necessary work.

But the matter does not end there, because the question remains whether this block of masonry can be said to be "any falling material or article" within that regulation. There is no doubt that those words are wide and, on the face of them, unqualified; but I find it impossible to construe this regulation as applying to material which has become part of the structure and affixed to the freehold. It seems to me that this regulation is applying to things such as scaffold materials, and tools, and also to materials such as bricks and the like, which have not become affixed to the structure but which it is intended should be affixed to the structure—and, of course, the ordinary builders' debris.

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[1] [1937] 1 K.B. 187; 53 T.L.R. 38; [1936] 3 All E.R. 151.

It is, I think, relevant to glance at regulation 90 (2), which is referring to "materials, tools, and other objects and material "(including waste material)." It is provided that that "shall "not be thrown, tipped or shot down from a height where they "are liable to cause injury, but shall be properly lowered." Then when it goes on to deal with demolition it deals specifically with "part of a structure," because it goes on: "in any place where "proper lowering is not practicable and also where any part of "a structure is being demolished or broken off adequate steps "shall be taken, where necessary, to protect persons employed "from falling or flying debris." Finally, it is to be observed that in regulation 94 provision is made for safeguarding workmen from the collapse of the structure.

In my judgment, regulation 90 is designed to protect men working at sites where the men habitually do work from what I may call falling materials and debris of that kind and not from a collapse of the structure, whether it be a chimney, a roof, or (as in this case) part of a shaft. At the same time, it seems to me that if in fact this plaintiff had been hit by a hammer or a loose brick falling down the shaft, the first defendants would have been liable to him in that they were in breach of that regulation. Accordingly, as it seems to me, this is a case where they cannot say they were not in breach of the regulation at all, because it was their duty to take steps to put up some umbrella, albeit only an umbrella designed to prevent materials and debris and tools from falling down. But be that as it may, and assuming, as I do, that they were in breach, it was not that breach which caused the injuries in this case but the fact that this block of masonry, something which is completely outside the regulation, fell in the way I have described.

In those circumstances, I have come to the conclusion that the first defendants' appeal succeeds and that they are under no liability to the plaintiff, whether at common law or under the regulation. That being so, the second defendants' appeal —which was an appeal in regard to costs—does not, in the form presented, arise in this case.

For those reasons, I would allow the first defendants' appeal and dismiss the second defendants' appeal.

PEARCE L.J. I agree.

JENKINS L.J. I also agree; and although we are differing from the judge, I find nothing that I can usefully add to the reasons given by Parker L.J.

Appeal of first defendants allowed with costs. Judgment to be entered for first defendants against plaintiff with costs in both courts, direct. Appeal of second defendants dismissed. Plaintiff's and first defendants' costs of appeal to be paid by second defendants direct.

Solicitors: *Hextall, Erskine & Co.; Watson, Sons & Room; Rowley, Ashworth & Co.*

J. A. G.

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Lord Goddard C.J., Morris L.J. and McNair J.

Mines and Minerals—Coal—Breach of statutory duty—Roof and sides —Fall of coal from coal face—Duty to make secure side of working place—Whether "coal face" a "side"—Meaning of "secure"— Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49.

The plaintiff was employed as a ripper by the defendants in their coal mine at a coal face which was being worked on the "long "wall" system, the face being about 150 yards long and about six feet high. While the plaintiff was walking along the coal face a large piece of coal came away from the top of the face, striking and injuring the plaintiff. The plaintiff brought an action for damages against the defendants, alleging that the defendants were in breach of their statutory duty under section 49 of the Coal Mines

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[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

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Act, 1911,[1] in that they had failed to make secure the roof and sides of every travelling road and working place, and had caused the plaintiff to walk along the coal face at a time when the face had not been made secure. It was admitted by the defendants that the place where the incident had occurred was a "working place" within the meaning of section 49 of the Act. Salmon J. gave judgment for the defendants. The plaintiff appealed:—

Held, dismissing the appeal (Morris L.J. dissenting), that the obligation imposed by section 49 of the Coal Mines Act, 1911, to make secure the sides of a working place did not extend to the coal face.

Per McNair J. It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole object of the operation is to make it insecure.

Elliot v. *National Coal Board*, 1956 S.C. 484; 1957 S.L.T. 193 applied.

Per Morris L.J. In my judgment it would be strange if the section were inapplicable to cover the place where the need to achieve security is most marked.

Decision of Salmon J. [1957] 1 W.L.R. 973; [1957] 3 All E.R. 368n. affirmed.

APPEAL from Salmon J. sitting at Shropshire Summer Assizes.[2]

The plaintiff was an underground worker in the defendants' coal mine, where he was employed as a ripper. On December 2, 1955, the plaintiff was detailed to walk along the coal face to help fill-off coal which had been left by the previous shift. The coal face, which was being worked on the "long wall" system, was about 150 yards long and about 6 feet high. Whilst the plaintiff was walking along the coal face, a large piece of coal came away from the top of the face. Apparently it fell first on the plaintiff's shoulder, knocking him down and rendering him unconscious, and then on his legs, breaking one of them. The plaintiff brought an action for damages against the defendants alleging that the defendants were in breach of their statutory duty under section 49 of the Coal Mines Act, 1911, to make secure the side of a working place. Alternatively, the plaintiff claimed damages for negligence at common law. Salmon J. gave judgment for the defendants. The plaintiff appealed.

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[1] Coal Mines Act, 1911, s. 49: "The roof and sides of every travelling road and working place shall "be made secure, and a person shall "not, unless appointed for the purpose of exploring or repairing, travel "on or work in any travelling road "or working place which is not so "made secure."

[2] [1957] 1 W.L.R. 973; [1957] 3 All E.R. 368n.

This report is confined to the allegation that the defendants were in breach of their statutory duty.

Gerald Gardiner Q.C., *A. E. James* and *I. J. Black* for the plaintiff. There is a breach of section 49 of the Coal Mines Act, 1911. The coal face is included in the word "sides." *Penny* v. *National Coal Board*[3] supports this construction; *Elliot* v. *National Coal Board*[4] and *Young* v. *National Coal Board*[5] are against it. Section 49 is in Part II of the Act, which is headed "Provisions as to Safety," and sections 49–52 are headed "Support of Roof and Sides." The defendants concede two things: first, that the word "sides" in section 50 does include the face, and, secondly, that there is no obligation on the owner in respect of the face except under sections 49–50. "Sides" means every exposed surface, contiguous to the working place, which gives vertical support to the roof. This construction is not burdensome to the defendants: see sections 102 (3) and 102 (8) and *Walsh* v. *National Coal Board*.[6]

The basic fallacy in the defendants' case is that because the whole object of mining is to take down the coal face, section 49 does not apply: "secure" is construed as "permanently secure." But "secure" means safe; it does not mean "permanently immovable."

John Thompson Q.C. and *G. K. Mynett* for the defendants. Section 49 imposes an absolute obligation to make the sides of a working place secure, subject to section 102 (8). The whole purpose of mining is to break down the coal face, i.e., to make it insecure. It is therefore absurd to say that the face is a "side" which must be made secure. A working place need not have four sides. The face is in fact part of the working place itself, and not a "side." *Boyd* v. *National Coal Board*[7]; *Green* v. *National Coal Board*[8]; *Carney* v. *National Coal Board*[9] and *Young* v. *National Coal Board*[10] support this construction; *Penny* v. *National Coal Board*[11] is against it. Such a construction does not mean that miners at the face are unprotected: there are the other provisions of the Act (notably section 50), the "Support Rules" and the common law duty of the owner.

Gerald Gardiner Q.C. in reply. A face can be made "secure" even though the security is only temporary. Only if "secure"

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[3] Unreported, January 27, 1955.

[4] 1956 S.C. 484.

[5] Unreported, July 5, 1956.

[6] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

[7] Unreported, December 14, 1954.

[8] Unreported, December 20, 1955.

[9] Unreported, December 16, 1957.

[10] Unreported, July 5, 1956.

[11] Unreported, January 27, 1955.

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means permanently irremovable is there any reason for holding that the face is not a side. Most men work near the face in a mine and should enjoy the protection of section 49. The face was to one side of the plaintiff; there would have to be some strong reason for holding that it was not a "side." "Sides" are mentioned in section 50; the meaning of the word in that section should be considered in construing section 49. There is no finding under section 102 (8) and no evidence to justify such a finding by this court.

February 28. The following judgments were read.

Morris L.J. On December 2, 1955, the plaintiff, who was an underground worker in the employment of the defendants, the National Coal Board, was a member of a shift that began work at 7 a.m. At about 7.45 a.m., whilst the plaintiff was walking near to the coal face, a large piece of coal fell upon him and he was injured. The piece of coal was about 12 feet in length and about 2 feet 6 inches thick. The falling coal apparently hit his shoulder and knocked him down. He was rendered unconscious and the coal fell on his legs, one of which was broken. He brought an action against the National Coal Board claiming damages for his injury. The case was heard before Salmon J., who dismissed the claim, while assessing the damages in the sum of £600 had they been recoverable.

The claim of the plaintiff was put, first, on the basis of breach of statutory duty and, secondly, on the basis of common law negligence. The plaintiff was employed at the Granville Colliery at Donnington in Shropshire. At the period of his accident work was proceeding at a coal face which was known as "B" panel double face. That face was being worked on the "long wall" system. The face in question was about 150 yards long and the seam of coal was approximately 6 feet in height. Mechanical coal cutting was in operation. The general system involved progressive winning of the coal from the whole 150-yard length of the seam. This meant that by systematic working there was a gradual advance from day to day of the coal cutting machines and of the conveyors, and also of the main gate road head and of the built-up packs. The system of working demanded three separate shifts. These shifts were operated in the following way: One shift worked from 3 p.m. until 10.30 p.m. That was the cutting shift. During that period mechanical cutting took place. The seam was cut approximately 6 inches from the ground. The cut was to a depth into the seam itself of about 4 feet 6 inches. When the coal in a seam is thus cut, some of it then or soon afterwards falls to the ground. Where it does not so fall wedges are placed in position to support the undercut coal. These are known as "holding props." If the coal is liable to fall from the outer side of the face, then supports are put in position. These are known as "sprags" and they are placed diagonally, where necessary, against the side of the face. The succeeding shift came on at 10.30 p.m. and worked until 7 a.m. That shift was known as the "filling" shift. The task of those on the filling shift was to win and get away the coal that could be extracted as a result of the previous cutting. Some of the coal would be on the ground and for the remainder it was extracted by appropriate means. It is manifest that as such work proceeds continuous and systematic supporting of the roof and sides is necessary. As the coal is obtained it is put on the conveyor which leads to the conveyor in the main gate or supply road. The next shift came on at 7 a.m. and worked until 3 p.m. The main normal task of those employed on that shift was to make all the necessary preparations for the next stage of advance into the coal face. The supply road had to be advanced and its roof and sides made secure. There might be a need to remove stone so as to give the necessary height of roof in the supply road. Packs would have to be built up at suitable intervals so as to support the roof in the space created by the extraction of coal. Stone secured in the process of raising the height of the supply road could be used for building up the packs. The necessary preparations would have to be made near to the then existing face of coal which in the succeeding shift would be operated on by the cutters and the fillers. Hence rails would have to be advanced to new positions nearer to and parallel with the new coal face. At the end of the work done during such third shift, preparations would be complete to enable new cutting to be made at the coal face to a new further depth of 4 feet 6 inches so as to enable further coal to be secured. So the cycle of operations would continue. As the coal was extracted, so, from time to time and constantly, had support to be provided in place of the support previously given by the extracted coal.

Under a system of long wall coal mining some of the supports which are used must in the nature of things be in position for only a short time. As advance continues the places where men once worked are left behind in the area in the rear of the packs which is known as the "waste." The supply roads are continually advancing. They will be in use so long as the seam is being worked. They require systematic and progressive attention so as to ensure that the newly added daily extensions are secure for their purpose.

The plaintiff was, as a ripper and packer, a member of the third shift to which I have referred. When he went to work on the morning of December 2, 1955, he found that the previous shift had not been able to do all that they would normally have done. There had been some trouble with a conveyor. As a result the coal had not been won and removed. Accordingly it was necessary for the men on the third shift to take away coal before they could perform their normal and expected tasks. The plaintiff was directed to go to the coal face. He went along the supply road and then turned to his right and proceeded some 50 yards. He was intending to proceed further when the piece of coal fell upon him. He had passed a number of men on his shift who had already begun their work of "filling-off" the coal.

It is provided by section 49 of the Coal Mines Act, 1911, as follows: "The roof and sides of every travelling road and working "place shall be made secure, and a person shall not, unless "appointed for the purpose of exploring or repairing, travel on "or work in any travelling road or working place which is not so "made secure."

It has not been in dispute that the plaintiff was at his "working place" at the time of the accident. In their defence in the action the defendants admitted "That on the date and at "the time and place alleged in the statement of claim a large "lump of coal fell or slid from the coal face and struck the "plaintiff. The place where he was struck was a working place "within the meaning of section 49 of the Coal Mines Act, 1911." The question therefore arises whether the large piece of coal that fell on the appellant came from the side of a working place. If it did, it cannot be doubted that the side had not been made secure. It is said, however, that the coal at the coal face itself should not be regarded as constituting either the roof or the sides of a working place. A question of much importance is here raised. It is one that has received judicial consideration in a number of cases. Salmon J. held in this case that the defendants were not in any breach of their statutory duty, for he held that section 49 of the Act does not apply to the coal face itself. He thought that since the whole object of mining is to take down the coal face, it should be held that the section is not applicable to men actually working at the coal face.

Though I am conscious that there is much judicial support (though not binding on this court) for the view of the judge, I do not find myself able to share it. In my judgment the section applies to every working place. The section is imperative. It creates an absolute obligation. I see no warrant for reading into the section any words of exclusion. In my judgment it would be strange if the section were inapplicable to cover the place where the need to achieve security is most marked. The section is in that Part of the Coal Mines Act, 1911, which contains provisions as to safety.

It is implicit in the work of extracting coal that some place or places will be made insecure. It is that very circumstance that makes it necessary to impose an obligation to make secure and also to have careful, elaborate and systematic rules in regard to safety and security. The whole operation of mining involves that there is a constantly changing situation. As insecurity is created, so now security must be provided. As the coal in a seam is taken away, so new support must be put in position to replace the support that has been removed.

It is, I think, important to have in mind that the obligation is that the roof and sides of a working place "shall be made "secure." This language involves that there is a state of insecurity that demands attention. The obligation is not to keep secure. Such an obligation might well be impossible of fulfilment in the course of coal mining operations. The very nature of coal mining brings it about that in the process of removing coal from its resting place, there will be a withdrawal of support with consequential temporary instability and insecurity. But, in the interests of safety, the risks must be minimized and, accordingly, there is an absolute duty to make secure.

Under section 50 of the Coal Mines Act, 1911, certain rules have to be made. But the obligations under section 50 do not supplant the general obligation imposed by section 49 of the Act. A consideration of section 50 and of the rules made under it does, however, serve to illustrate that the roof and sides at the face itself are not excluded but are included. Subsection (1) of section 50, which refers to the roof at the working place, provides that "the roof under which any work of getting coal or filling "tubs is carried on shall be systematically and adequately "supported." The props or chocks used to support the roof must be set at such regular intervals and in such manner as may be specified in rules which are known as "Support Rules." It seems to me that the roof is that which is above a man who is getting coal or filling tubs. The area of the roof may extend as work progresses but the roof must not only be adequately but "systematically" supported. Subsection (4) of section 50, as substituted by the Coal Mines (Support of Roof and Sides) General Regulations, 1947, provides that the manager of a mine must make rules "specifying in relation to each seam of the mine, "particulars of the system or systems of controlling and supporting the roof and sides to be carried out in connexion with the "face workings, the roadheads and the roads, respectively." If a man is working at the face it seems to me that that which is above him is the roof and that the exposed surfaces which are about him are the sides. The peril to which he is exposed is the peril that something may fall on him either from the top or from the side. It is this very peril which he and all others must avert. That can only be done by the systematic and continuous erection of new supports in places where, as a result of the mining operation, they are newly needed. Accordingly, there must be compliance with the general obligation imposed by section 49 of the Act, and also with any specific or detailed obligations imposed by section 50. In the Support Rules which were made in reference to this working face, it was provided that "When the fall of roof or side involving the displacement or "breakage of supports has occurred in any place where any "person has to work or pass, any newly exposed roof or sides "shall at once (1) be dressed, if necessary, and (2) be secured by "supports before the work of clearing any debris, other than such "work as is necessary to set supports, is begun." It would seem to me to be very strange if this did not cover a newly exposed roof or side consisting of coal at the working face. There will be a newly exposed side when coal is taken down. Those employed in the filling shift are each assigned a stint which consists of a certain number of yards of frontage of the coal face. A man may begin to extract coal from the centre part of his stint and may at first work inwards so that, after a time, he will have coal in front of him and on either side of him.

As he progresses so must he make the roof and sides secure. If a man's work involves that he is engaged in the very process of making secure, then (unless he has reason to complain of the conduct of anyone else) he cannot assert that the defendants are in breach of section 49 of the Act. The position then is that the defendants, through his instrumentality, are engaged upon the actual operation of making secure so as to comply with section 49: see *Walsh* v. *National Coal Board.*[1]

Provision is made in the Coal Mines Act, 1911, for inspections prior to the commencement of work. Subsection (1) of section 64 is as follows: "The fireman, examiners, or deputies of a mine "shall, within such time not exceeding two hours immediately "before the commencement of work in a shift as may be fixed "by the regulations of the mine, inspect every part of the mine "situated beyond the station or each of the stations, [as to which "see section 63] and in which workmen are to work or pass "during that shift, and all working places in which work is "temporarily stopped within any ventilating district in which the "men have to work, and shall ascertain the condition thereof so "far as the presence of gas, ventilation, roof and sides, and "general safety are concerned."

I would think it very strange if such inspections of roof and sides of working places were not to include inspections of the actual face of the coal itself. That face, particularly if it has been undercut, may constitute a great source of peril for those who are sent there, if it is not made secure. It is further provided by subsection (3) of section 64 that there must be a full and accurate report not only as to gas, but as to "whether or not any, and, if "any, what defects in roofs or sides and other sources of danger "were observed." In the printed form which was used in this case to report after inspection, there is a heading "Condition of "roof and sides" followed by the words "State actual conditions "of (*a*) working faces and (*b*) roads, with location of any unsafe "place and action taken." This serves to illustrate the way in which the system was operated. The construction of the Act must, however, be determined upon a fair interpretation of the words which are used and of the context in which they are used.

In the present case, following the inspection made some time between 5 a.m. and 6.30 a.m., it was recorded that the condition of roof and sides was safe. The word used in section 49 is "secure," and no synonym or paraphrase of that word need be used. In its context it does not seem to me to denote an immutable or permanently static condition of affairs. What is required, in my judgment, is that when a man is either on a travelling road or at a working place, that which is on top of him and that which is around him shall be made so that it does not fall upon him.

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[1] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

In the present case the plaintiff was at a point where the work of attacking the face of the coal had not in his shift yet begun. The coal face should, in my judgment, have been made secure to enable the men on the new shift to approach it or pass along it. The men on the last shift should have made it secure before they left. As the plaintiff proceeded along he had the coal face on his left, and on his right hand he had at intervals a number of built-up packs. He was admittedly at a working place. I do not understand it to be doubted that if some stone from one of the packs had fallen on his right shoulder, the defendants would have been in breach of section 49 of the Act. It is said, however, that because the insecure thing that struck him on his left shoulder consisted of coal from the face, there was no breach of section 49. For the reasons that I have given I cannot agree with this submission. It would seem to me to be unfortunate if it were held that the obligation to make secure the roof and sides of a working place does not apply if the working place is at a coal face itself. That involves reading something into the statute. It would involve diminishing the scope of the statutory obligation at the very place where, in the interests of safety, compliance with it is most needed.

I have not thought it appropriate to refer to or to consider the Mines and Quarries Act, 1954, the provisions of which are now in operation in the place of those contained in the Coal Mines Act, 1911, now repealed. The latter Act was in force at the times which are relevant in this case.

Though the obligation under section 49 is absolute (see *Edwards* v. *National Coal Board*[2]), a measure of protection is given by subsection (8) of section 102, which provides that "The "owner of a mine shall not be liable to an action for damages "as for breach of statutory duty in respect of any contravention "of or non-compliance with any of the provisions of this Act if "it is shown that it was not reasonably practicable to avoid or "prevent the breach." As, in my judgment, it was shown that the defendants were in breach of section 49, the question arises whether they are protected from liability in this case on the ground that it was not reasonably practicable to avoid or prevent the breach. As the judge was of opinion that there was no breach, it was not necessary for him to express a conclusion in regard to this matter. Authoritative guidance as to the considerations to be had in mind is to be found in the case of *Marshall* v.

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[2] [1949] 1 K.B. 704; [1949] 1 All E.R. 743.

Gotham Co. Ltd.[3] If the view that I have formed in regard to the statute is the correct view, then the question arises whether there is sufficient or satisfactory material upon which to reach a conclusion as to whether it was reasonably practicable to avoid or prevent the breach. This matter is to some extent bound up with an issue that arises in regard to the common law aspects of the case.

[His Lordship then considered the plaintiff's claim in negligence, and continued:] The conclusion that I have reached is that it was shown that there was a breach of the obligation imposed upon the defendants by section 49 of the Coal Mines Act, 1911. In my judgment it becomes necessary on this basis to have a further hearing in order to decide whether the defendants are exculpated from liability on the basis of subsection (8) of section 102, i.e., whether the defendants can show that it was not reasonably practicable to avoid or prevent their breach of duty in failing to make secure the roof and sides of the place where the plaintiff was when he was injured.

For the reasons that I have given, I would allow the appeal and order a further hearing.

McNair J. considered the claim at common law and continued: I now turn to the second point raised in the appeal, viz., whether it is established that the defendants committed in respect of the place from which the coal fell, a breach of the statutory duty imposed by section 49 of the Coal Mines Act, 1911. [His Lordship read section 49 of the Act.]

It is conceded that the obligation imposed upon the owner of a mine by this section is an absolute obligation qualified only by section 102 (8) of the Act, which provides that "The owner of a "mine shall not be liable to an action for damages as for breach "of statutory duty in respect of any contravention of or non-"compliance with any of the provisions of this Act if it is shown "that it was not reasonably practicable to avoid or prevent the "breach."

The argument for the plaintiff on this branch of the case can be stated in the simplest form as follows: (1) The defendants by their defence admit that the place where the plaintiff was struck was a working place within the meaning of this section; (2) as he walked along the coal face to the place where he was struck, he had on his left hand side the coal face which was a side of this working place; (3) the fact that the coal which struck him fell from the coal face established that the face had not been made secure.

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[3] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937

The judge rejected the argument in a short passage of his judgment which reads as follows: "The main point, however, "remains that this section cannot be intended to apply to the "coal face because the whole object of mining is to take down "the coal face; therefore, a section that refers to an obligation to "make secure the sides of a working place, and prohibits anyone "from working in such a place which has not been so made "secure, cannot, in my judgment, be intended to apply to the "coal face itself." After stating this conclusion, the judge said that if for the word "secure" the word "safe" had been substituted, he would have decided the point the other way. Though I agree with the judge that "secure" here does not mean "safe" but means a physical condition of stability which will ordinarily result in safety, I, myself, do not feel that the substitution of the word "safe" would affect the problem.

The question whether a coal face or a ripping face is the side of a working place within the meaning of this section had, before the decision of Salmon J. in this case, been considered by three judges of the Queen's Bench Division on circuit and two Scottish judges of the Outer House, and since Salmon J.'s decision I have considered a similar but not identical point, also on circuit; and with one possible exception (an unreported decision of Byrne J. in *Penny* v. *National Coal Board* [4]) those decisions have been consistent in holding that the coal face is not such a side. The most fully reasoned judgment on this point is to be found in the opinion of Lord Cameron in *Elliot* v. *National Coal Board*,[5] which was followed by Lord Wheatley in *Young* v. *National Coal Board*.[6] Neither of those decisions has, we were informed, been considered by the Inner House.

In *Elliot* v. *National Coal Board* [7] the pursuer was undoubtedly injured by a fall of substance of some kind which occurred while he was working in a working place. The pursuer alleged that it was a heavy fall of stone from the opencast above the coal face, but in his judgment Lord Cameron said that it was by no means clear from the evidence from what precise portion of the area of the opencast the fall came, and in particular, whether it was proved to have come from the face of the opencast. But, in view of the fact that the case proceeded on the basis of unchallenged fact that whatever fell on the pursuer fell from the

[4] Unreported, January 27, 1955.

[5] 1956 S.C. 484; 1957 S.L.T. 193.

[6] Unreported, July 5, 1956.

[7] 1956 S.C. 484.

face in the area of the opencast, Lord Cameron held that the critical issue was " whether the face of this opencast is compre-" hended within the statutory words ' sides of . . . a working " ' place.' " Lord Cameron, after observing that " the whole " purpose of longwall method of mining is to cut coal by advancing " the face and to do so by progressive destruction and removal of " the face itself, a process which is the complete antithesis of sup-" porting and making the face secure, and that consequently the " condition as well as the function of the face in longwall working " is totally different from that of the sides proper or the rear or " waste of the working place," turned to the precise construction of the section and said: " Now the Act does not define roof or " sides, but it is plain enough that at least in one important " particular they can be differentiated from the face, because " once a roof, or what is indisputably a side of a working place " or a travelling road is in existence, it will not be subject to " interference or deliberate destruction for the purpose of winning " coal from it, and, therefore, measures already taken for its " security may be expected to have a certain quality of per-" manence. Therefore I think that in the circumstances the " effect of specific reference to portions of a working, which in " the sense I have mentioned, are markedly different from the " face itself is to suggest that the face from which the coal is " won may have been deliberately excluded from the requirement " of this peremptory and penal section and is not comprehended " sub silentio in the word ' sides '." After referring to the provisions of section 50, and in particular to those provisions referring to the Support Rules, relating to the support of roof and sides of face workings, and the absence of any requirement that the face itself shall be supported, he came to the conclusion that " by " limiting the application of section 49 to the roof and sides of " travelling roads and working places the legislature excluded " from the scope of this obligation of security imposed by that " section the face of the working place itself." Lord Wheatley, in *Young* v. *National Coal Board*,[8] expressed his view as follows: " The purpose of the section is manifestly to secure that where a " person has to traverse a road or work at a working place, his " surroundings will be made secure to prevent a fall of material, " whether it be coal or stone or dirt or anything else which might " endanger his safety. There is thus envisaged the taking of " precautions to provide a permanent security to prevent the " occurrence of such an event, but I cannot see how that can be

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[8] Unreported, July 5, 1956.

"extended to embrace the coal face when the whole purpose of "this mining operation is systematically and continuously to strip "the face and bring down from the face the very materials "against which the workman has otherwise to be protected. "From that point of view it would make nonsense of the section "to include the face in the expression 'sides,' and, in my "opinion, the section cannot be deemed to provide for such an "inclusion."

Turning now to the English cases, Jones J., in *Boyd* v. *National Coal Board*,[9] observed that the section did not apply to a fall from the face itself. Oliver J., in *Green* v. *National Coal Board*,[10] stating that it was perfectly obvious that it would be impossible to maintain that the working face should be made secure when the whole object of the work was to knock it to pieces, held that a man injured by the fall of a stone from the face was not protected by section 49 of the Act. Byrne J., in *Penny* v. *National Coal Board*,[11] after holding that a cutter man employed at the coal face was entitled to recover at common law in respect of injuries he suffered when an overhanging stone fell from the ripping face, on the ground that the defendants knew of the danger of the overhanging stone but took no steps to ensure that the place was rendered safe, also held that the plaintiff was entitled to recover under section 49 on the ground that the face was a side of a working place, stating that, if any other construction were to be put upon this section, it would follow that so far as the coal face of any mine is concerned, the coal face could be left without any support of any kind without committing a breach of the statute. With respect, I consider this reasoning is fallacious, since it overlooks the protection given by the Support Rules under section 50 (2). I refrain from commenting upon my own decision in *Carney* v. *National Coal Board*.[12]

In view of the decisions of the Scottish courts and the desirability of consistent decisions in both jurisdictions, it would, in my judgment, be wrong for this court to arrive at a contrary decision on this matter of construction, unless those decisions, and the reasoning upon which they are based, are in the view of this court plainly erroneous.

In my judgment, so far from being plainly erroneous, they are correct. It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole object of the operation is to make it insecure. The fallacy in the plaintiff's argument seems to me to lie in the false assumption that every working place underground has a roof and four sides. In truth, the coal face upon which he is operating is part of his working place itself, and does not cease to be part of his working place if, in the process of breaking in he makes a hole in the face and then proceeds to work either way to the boundaries of his stint. No doubt in the progress of his work at the face, he will, according to prudent mining practice, insert props and sprags to provide temporary security from the risk of falls from above him or from his sides, but such props or sprags would not be put up in discharge of the defendants' obligation to make the roof and sides of the working place secure. The cutter who makes the initial cut in the face, thus rendering the face insecure, his mate who inserts the holding props under the uncut coal, the shot-firer who, in cases of necessity still further reduces the stability of the face, are all working in a working place, but it would be absurd, as I see it, to hold that the statute imposes upon the defendants in all those cases the absolute obligation of making the face secure.

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[9] Unreported, December 14, 1954.

[10] Unreported, December 20, 1955.

[11] Unreported, January 27, 1955.

[12] Unreported, December 16, 1957.

Indeed, on the evidence in this case, it is plain that on this particular seam after the cutter has done its work the face, in many places at least, would not even have the characteristic of a side, viz., a vertical plain surface, since a substantial portion of the face—put by one witness as 80 per cent.—" rates off " or falls down as soon as the cutter passes, and lies with the gummings made by the cutter on the floor.

In my judgment, accordingly, the appeal should be dismissed.

Lord Goddard C.J. (read by Morris L.J.). I agree with the judgment of McNair J. and would dismiss this appeal. The point of general importance in the case is as to the true construction of section 49 of the Coal Mines Act, 1911, which hitherto has not been the subject of a decision by an appellate court, either in England or Scotland. Considering how long the section has been in force, it is remarkable that the question whether the coal face could itself constitute the side of a working place, does not appear ever to have been raised until December, 1954, when it was answered in the negative by Jones J. in *Boyd* v. *National Coal Board*.[13] To the same effect were judgments of Oliver J. in *Green* v. *National Coal Board*[14] and McNair J. in *Carney* v. *National*

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[13] Unreported, December 14, 1954.

[14] Unreported, December 20, 1955.

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Coal Board,[15] though a contrary view was taken by Byrne J. in *Penny* v. *National Coal Board*.[16] In 1956 there were two decisions in the Outer House of the Court of Session, first by Lord Cameron in *Elliot* v. *National Coal Board*,[17] and then by Lord Wheatley to the same effect in *Young* v. *National Coal Board*.[18] I find the judgment of Lord Cameron entirely convincing, as did Lord Wheatley, and can add nothing to it. I cannot think that the coal face which is being worked can properly be described as the side of the working place.

[His Lordship then considered the plaintiff's claim in negligence, and continued:] I see no reason for reversing the judge's decision that no claim at common law had been established.

Appeal dismissed.
Leave to appeal to the House
of Lords granted.

Solicitors: *Stafford Clark & Co. for Hooper & Fairbairn, Dudley; F. W. Dawson, Dudley.*

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[15] Unreported, December 16, 1957.
[16] Unreported, January 27, 1955.
[17] 1956 S.C. 484.
[18] Unreported, July 5, 1956.

1958
Oct. 15.

Lord Parker
C.J.,
Cassels and
Streatfeild JJ.

RANDS *v.* OLDROYD.

Local Government — Meeting of local authority — Voting — Pecuniary interest—Member of local authority director of local building firm—Whether permitted to vote on matters relating to tenders—Whether mere right to tender in future constitutes direct pecuniary interest—"Pecuniary interest . . . in any contract . . . or other matter"—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 76 (1).

The defendant was managing director of and held a controlling interest in a building company and was also a member of the local council. The company had taken part in various building contracts for the council, but had not tendered for any such contracts since 1954. In 1956, in view of his position on the council, the defendant decided that the company would not tender in future for any building contracts for the council. In 1957, at a meeting of the council, a motion was proposed that, where it was required that tenders should be obtained, the borough engineer should submit a tender on behalf of his department, and where necessary, the direct labour force should be increased to implement that policy. The motion was subsequently amended by deleting that part referring to the increase of the direct labour force, and the defendant voted in favour of the motion as amended. On an information preferred against the defendant under section 76 of the Local Government Act, 1933 [1]:—

Held, that no limitation should be put on the words "any other "matter" in section 76 (1); and that, although the defendant's company did not have any pecuniary interest "in any contract or "proposed contract" within that subsection, it had a direct pecuniary interest in an "other matter," namely, that if the original motion was carried the competition of the borough engineer might prevent the company, if they tendered, from obtaining a contract; although the company had decided not to tender in future, it was always open to it to reverse that policy, accordingly, its interest was "direct" and not too remote and the defendant, as its managing director, had an indirect pecuniary interest in the matter under discussion and by voting was guilty of an offence.

Brown v. *Director of Public Prosecutions* [1956] 2 Q.B. 369; [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189 considered.

CASE STATED by the Ely justices, sitting at Wisbech.

On February 5, 1958, an information was preferred by Donald Oldroyd, detective inspector, on behalf of the Director of Public Prosecutions, alleging that the defendant, Leslie Harry Rands, on September 27, 1957, at Wisbech, being a member of the Wisbech Borough Council and then having an indirect pecuniary interest in a matter under consideration at a meeting of the council, namely, the submission of tenders by the borough engineer for certain contracts, was present at the meeting and took part in the discussion, contrary to section 76 of the Local Government Act, 1933.

The justices found the following facts:

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[1] Local Government Act, 1933, s. 76: "(1) If a member of a local "authority has any pecuniary interest, direct or indirect, in any "contract or proposed contract or "other matter, and is present at a "meeting of the local authority at "which the contract or other matter "is the subject of consideration, he "shall at the meeting, as soon as "practicable after the commencement "thereof, disclose the fact, and shall "not take part in the consideration or "discussion of, or vote on any question with respect to, the contract or "other matter: Provided that this "section shall not apply to an interest "in a contract or other matter which "a member may have as a ratepayer "or inhabitant of the area, or as an "ordinary consumer of gas, electricity "or water, or to an interest in any "matter relating to the terms on "which the right to participate in any "service, including the supply of "goods, is offered to the public. "(2) For the purposes of this section "a person shall (subject as hereafter in this subsection provided) be "treated as having indirectly a pecuniary interest in a contract or other "matter, if—(*a*) he or any nominee of "his is a member of a company or "other body with which the contract "is made or is proposed to be made or "which has a direct pecuniary interest "in the other matter under consideration; . . ."

The defendant was managing director of, and holder of 200 of the 300 £10 ordinary shares in, Henry Rands & Son Ltd. (hereafter called "the company"), a private limited liability company carrying on business as builders in Wisbech. He was elected to the Wisbech Borough Council in May, 1950, and in May, 1956, was appointed vice-chairman of the housing and town planning committee of the council. He had been for a number of years the president of the Wisbech branch of the Federation of Building Trades Employers. The building of council houses was not the kind of work which the company normally did.

After the last war the company was encouraged by the council to tender for the building of council houses, and, as a result of the defendant's efforts, a tender was submitted by the federation on behalf of a number of local builders, including the company, and a bulk contract was made under which the individual builders concerned carried out separate parts of the work. In or about 1954 the defendant was asked by the council to invite local firms to tender for further work for the council, which he did, as a result of which a similar bulk contract was entered into and the defendant was publicly thanked at a council meeting. Since 1945 the company had taken part in nine contracts for building work for the council. The company's last contract for building work for the council was made in June, 1954, and the company's last tender (which was not accepted) for building work for the council was made in August, 1954. Although there had been approximately 15 building contracts put out for tender by the council since August, 1954, the company had not tendered for any such contracts. In May, 1956, when the defendant became vice-chairman of the housing and town planning committee of the council, he decided that in view of his holding that position, the company would not tender in future for any building contracts for the council.

The rules of the council with respect to contracts were set out in the council's standing orders, and in particular, provided that no contract exceeding £500 in value should be made unless either public notice had been given to enable people to tender, or invitations to tender had been sent out to selected persons. At a meeting of the council on July 12, 1957, a motion was proposed: "That where it is required that tenders shall be obtained in "compliance with standing order 3 concerning contracts, the "borough engineer shall submit a tender on behalf of his department "for any contract that he feels may be within the scope of "that department, and where necessary, the direct labour force "be increased in order to implement this policy."

Consideration of this motion was adjourned to the next ordinary meeting of the council, and the general purposes committee was instructed to report thereon. At a meeting of the general purposes committee held on September 16, 1957, the committee considered the motion and settled the terms of their report to the council thereon. At a meeting of the council held on September 27, 1957, at which the defendant was present, the motion was further considered by the council. The town clerk reported that the general purposes committee reported as follows: "The "committee consider that they cannot support the motion in its "present form as they do not consider it desirable to increase the "direct labour force. It is already the practice of the borough "engineer to submit tenders in cases where his present staff are "adequate, and the committee feel that this should continue to "be the practice. They therefore recommend that the motion "be amended as follows: (i) by deleting the last fifteen words "and substituting: 'and for which the present labour force is "'sufficient'; (ii) by substituting the word 'may' for the word "'shall' in the phrase 'shall submit a tender.'"

The defendant spoke in favour of the proposed amendments. At some stage in the defendant's speech another councillor objected to the defendant speaking on the ground that he, the defendant, had an interest in the matter which he should have declared. Differing opinions were expressed by various members of the council as to whether the defendant should take part in the discussion, and finally the defendant spoke in favour of the motion as amended by the general purposes committee. At the end of the debate the motion was adopted.

By reason of the fact that it was a local company and the nature of its business, the company was in a position to tender for building work for the council, and to tender for such work in the future if it should so desire.

It was contended by the prosecution that the company, by reason of its location and history and the nature of its business, was in an especially favourable position to submit tenders for building work for the council if it so wished and, therefore, had a direct pecuniary interest in the matter under discussion within the meaning of section 76 (1) of the Local Government Act, 1933, and that the defendant had an indirect pecuniary interest in the motion because he was managing director and a shareholder of the company.

It was contended by the defendant that it was not the intention, or the effect, of section 76 of the Local Government Act, 1933, that a member of a local authority should be debarred from taking part in the discussion of a question under consideration by the authority because the adoption of one or other of the alternative courses proposed might in the future result in financial benefit or disadvantage to that member. If that were so, local authorities would often be deprived of the views of members who alone possessed expert or technical knowledge of the question under discussion. Further, the expression " or other matter " in subsection (1) of section 76 was to be construed ejusdem generis with " contract or proposed contract," or was at any rate to be construed as meaning a specific transaction or matter which, like a contract or proposed contract, gave rise to rights and liabilities. Appropriate examples would be a town planning application or a compulsory purchase order affecting the member's land. In the present case, the discussion in the council did not relate to any such " matter," but only to a question of general policy in which no existing rights or liabilities were affected. The word " interest " in subsection (1) referred to such a relation between the member of the local authority and the " contract or proposed " contract or other matter " as gave the member some legal or equitable right arising out of or in connexion with the contract or other matter. In the present case, the defendant had no such interest. The expression " has any pecuniary interest " in subsection (1) meant that the defendant must have a present and existing pecuniary interest and not one which might arise at some future date. In the present case the defendant had no such interest. The company had no direct interest, and the defendant had therefore no indirect interest, in any matter within the meaning of subsection (1), since the only suggestion made by the prosecutor was that the company might in future tender for a council house contract or contracts, and that if (in accordance with the motion as unamended) the borough engineer were obliged to tender for every such contract and enabled to recruit a labour force sufficient to carry it out the company would, if they tendered, be faced with an additional competitive tender. The company had, in any event, no direct interest, and the defendant had therefore no indirect interest in any matter within the meaning of subsection (1).

The justices were of the opinion that the defendant was sincere in his statement that his company did not intend to tender for any further council work while he held office in the council, and that he had acted throughout in an open and honourable manner, but, in the absence of any positive statement or other steps by the defendant prior to the proceedings before them, the company could have tendered at any time. In such circumstances, they were of opinion that there had been a breach of section 76 of the Local Government Act, 1933, but that in all the circumstances it was proper to grant the defendant an absolute discharge. The defendant appealed.

Roy Wilson Q.C. and *Gerald Kidner* for the defendant. The main question is one of considerable importance to local councillors and councils throughout the country: Is a borough councillor debarred by section 76 from taking part in a council debate simply because the adoption of one or other of the courses proposed might result in a financial advantage or disadvantage to him at some future date? The construction of section 76 (1) contended for by the prosecution and adopted by the justices is far too wide—so wide, indeed, that, if it were adopted, it might frequently be impossible to find a quorum of councillors eligible to take part in debates on the kind of subjects they are constantly having to discuss. It could not be said that the company had a direct pecuniary interest in the subject of the council's debate—nor, consequently, that the defendant had an indirect pecuniary interest as managing director and shareholder—particularly in view of the fact that the defendant had decided that the company would not, in future, tender for any contract for building work for the council. The subject-matter of the council's debate concerned a matter of policy; the fact that the company might in the future be in a position to tender for contracts for building work with the council could in no possible way, consistent with the words of the section, make the subject-matter of the debate a "contract or proposed contract or other matter." When analysed, *Brown* v. *Director of Public Prosecutions* [2] supports the defendant's contentions. That was a case in which the matter in question was actual contracts. The expression "or "other matter" in section 76 (1) should be construed ejusdem generis with "contract or proposed contract," or should at any rate be construed as meaning a specific transaction or matter which, like a contract or proposed contract, would create and give rise to rights and liabilities, such as a town planning application, or a compulsory purchase order, or the derequisitioning of property. The expression used in the Municipal Corporations Act, 1882, s. 22 (3), which was the forerunner of section 76 of the Act of 1933, was "any matter." The only conclusion which can be drawn from the difference in the wording of the later Act is that the legislature desired to narrow down the nature of the "matter" to be caught by the section. The expression "has "a pecuniary interest" means a present and existing pecuniary interest. The definition of "interest" given by Sir John Simon K.C. and W. A. Greene K.C. in *Lapish* v. *Braithwaite* [3] is adopted—"such a relation between the councillor and the con-"tract as gives the councillor some legal or equitable right arising "out of or in connection with the contract." The cases of *England* v. *Inglis* [4] and *Nutton* v. *Wilson*,[5] which dealt with disqualification of councillors, have a faint bearing on the present case. It would be going too far to say that the phrase "any "other matter" in section 76 (1) was wide enough to cover the kind of case where there might be a possibility of future financial benefit as a result of a debate concerning council policy. Section 76 is to be narrowly construed.

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[2] [1956] 2 Q.B. 369; [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189.

S. A. Morton for the prosecutor. From their position in the locality and the fact that they had tendered and done work for the council in the past, the company, whatever its future intention with regard to tenders, had a pecuniary interest in the council's practice with regard to tenders or the acceptance of tenders. What was said in *Brown* v. *Director of Public Prosecutions* [6] was that the words of the section were not to be very narrowly looked at, but were to be construed in such a way as to prevent members of a local council being exposed to temptation or the semblance of temptation. The effect of altering the words "has, directly or indirectly, . . . any pecuniary interest" in a matter in section 22 of the Municipal Corporations Act, 1882, to read "has any pecuniary interest, direct or indirect, in any "contract or proposed contract or other matter" was to widen them; the object was to prevent the conflict between interest and duty. Nobody had more interest in tenders than local building contractors. Acceptance of the defendant's argument would mean that any member of a council might take part in a discussion provided that he had no *existing* interest in a contract or proposed contract. "Existing interest" was not the purpose of the statute.

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[3] [1926] A.C. 275, 277.
[4] [1920] 2 K.B. 636.
[5] (1889) 22 Q.B.D. 744.
[6] [1956] 2 Q.B. 369.

Roy Wilson Q.C. in reply. The only effect of replacing of the words " any matter " in section 22 (3) of the Act of 1882 by the words " any contract or proposed contract or other matter " in section 76 (1) of the Act of 1933 was to narrow them. The contention that the purpose of sections such as section 76 is that councillors should not place themselves in a position in which their duty and interest are in conflict with each other is not the proper approach. There is a clear line of distinction between those things which a statute makes criminal and punishable and those things which any decent man would refrain from doing. Section 76 is a penal section and should be narrowly construed.

LORD PARKER C.J. stated the facts, referred to section 76 (1) and (2) of the Local Government Act, 1933, and continued: It is clear that the member of the council concerned, namely, the defendant, can only have an indirect pecuniary interest in this case if the company itself has a direct pecuniary interest. Therefore, one can limit the matter to simply this: Did Henry Rands & Son Ltd. in the circumstances of this case have a direct pecuniary interest in any contract or proposed contract or other matter which was the subject of discussion at the meeting? There is no question here of any contract or proposed contract. If the company had a direct pecuniary interest it was because they had a direct pecuniary interest in an " other matter," and what is said quite shortly is this, that the matter under discussion was a matter which, to put it generally, seriously affected the company in a pecuniary way in that, if the original motion was carried, the competition of the borough engineer might well be such as to prevent the company, if they tendered, from ever getting a contract. It is said that, accordingly, they had a financial interest and a direct financial interest in the matter to be discussed, and which was discussed at that meeting.

The all-important matter is to consider the mischief aimed at by section 76. One can say it is obvious, and indeed it is. It was put by Lord Esher M.R. in *Nutton* v. *Wilson*,[1] a case considering a rather similar provision in the Public Health Act, 1875, in these words: " I adhere to what I have before said with " regard to provisions of this kind. They are intended to prevent " the members of local boards, which may have occasion to enter " into contracts, from being exposed to temptation, or even to " the semblance of temptation." Lindley L.J. in the same case said [2]: "To interpret words of this kind, which have no very "definite meaning, and which perhaps were purposely employed "for that very reason, we must look at the object to be attained. "The object obviously was to prevent the conflict between "interest and duty that might otherwise inevitably arise."

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[1] (1889) 22 Q.B.D. 744, 747.

That is clearly the object of section 76 of the Local Government Act, 1933, and whereas, of course, a consideration of the mischief aimed at does not enable the court to construe the words in a wider sense than they appear, it at least means that the court would not be acute to cut down words otherwise wide merely because this was a penal statute. Mr. Wilson in his very able argument has contended that, nevertheless, the words "having a "direct pecuniary interest in any contract or proposed contract "or other matter," are not as wide, properly construed, as one would otherwise think. He relies in particular on the words "or "other matter," and he says that whether one looks at the matter as a case of ejusdem generis or of noscitur a sociis, at any rate "other matter" must be something confined to what he would say was a specific transaction, and not a matter of what might be said to be general policy. Apart from relying on that principle he also points out that in the Municipal Corporations Act, 1882, which was repealed by the Local Government Act, 1933, the corresponding section, section 22 (3), was in these terms: "A member of the council shall not vote or take part in "the discussion of any matter before the council, or a committee, "in which he has, directly or indirectly, by himself or by his "partner, any pecuniary interest." He points out that that is quite general; there is no reference there to a specific contract or proposed contract, and he invites the court to say that section 76 was intended to be a limitation on what heretofore had been a very general provision. I find it impossible to give any satisfactory narrower meaning, even if I were so minded, to those words "any contract or proposed contract or other matter." I do not propose to go through the number of illustrations which have been canvassed in this court, but the more one does consider the matter the more difficult and impossible it is to cut down those words "or other matter" to something which was definable and which was a limitation on what appear to be general words. Bearing in mind the mischief aimed at by this Act, I do not think those words are to be read in other than a very general way, and I see no ground for introducing a limitation which, as I said, is one which cannot satisfactorily be defined.

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[2] 22 Q.B.D. 744, 748.

Mr. Wilson pointed out that if you construe section 76 in a very wide way you may make business at council meetings impossible, it may stultify the whole proceedings, and that he invokes as another ground for cutting down the general meaning of those words. I quite appreciate the force of that argument, but I think the limitation to be found in section 76 is not in regard to the words "in any contract or proposed contract or other "matter," but in the consideration of whether the person under consideration—the company here—had a direct pecuniary interest. I think the limitation is to be found in that word "direct" as opposed to a pecuniary interest which is too remote. In the present case I am satisfied that the company did have a direct pecuniary interest, and that that interest was not too remote to bring them within the words of the section. All these cases, of course, must be determined ultimately on their particular facts, but I think that some help is to be gained by a consideration of one of the only two cases which have come before this court on this question, namely, *Brown* v. *Director of Public Prosecutions*.[3] The question there to be debated was as to lodgers' allowances to be paid by tenants of council houses, and three of the councillors who were on the council considering this matter were in fact tenants of council houses, albeit they had not any lodgers. The court were clearly of opinion that those councillors who were already tenants, albeit they did not have lodgers as yet and might never have lodgers, did have a pecuniary interest in the contract or proposed contract of tenancy. The court went on to contrast the position of those councillors who might become tenants of a council house in the future but who as yet had not become tenants. It is enough, I think, to refer to two passages, first, in the judgment of Lord Goddard C.J., where he said[4]: "I think that Parliament has laid down "that on any matter in which a member of a local authority has "a pecuniary interest—and he undoubtedly has a pecuniary "interest if he is paying rent for a house owned by the council— "he should not vote at all. . . ." A little further on he refers to what might be thought to be anomalies; he said[5]: "It is "true that anomalies may occur—if they are really anomalies,

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[3] [1956] 2 Q.B. 369; [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189.

[4] [1956] 2 Q.B. 369, 376.

[5] Ibid. 377.

"though I do not think they are—for instance, councillors might "vote on those matters knowing, perhaps, that in a few months "time they might themselves be the occupiers of council houses "and pay rent to the council. One cannot deal with every point "which arises, but if a person occupies a council house, I think "that he is debarred by the terms of section 76 from voting." Again, Donovan J. in his judgment[6] after stating: "The object "of section 76 (1) is clearly to prevent councillors from voting on "a matter which may affect their own pockets and which may "therefore affect their judgment," goes on to say: "I am "referring to the three who had not taken any lodgers or sublet at "the time, but who each had a council house which was a potential income-producing asset. Their case is different from a "councillor who merely had a hope of obtaining such a house in "the future." The facts there were quite different. What was being considered was a contract of tenancy, but I think the relevance of it is that in laying down the limitation in the case of councillors who had not yet got tenancies, the court were making the very point I am trying to make, namely, that one has to consider whether the pecuniary interest was direct or remote, and they were really saying that the interest of councillors who had not a council house was too remote, whereas those that did have a council house came within the words of the section. In the present case the company clearly had a direct pecuniary interest in the matter under discussion.

Finally, I should say this: The justices found that not only since 1954 had the company not tendered, but that the defendant himself had decided that in view of his position as vice-chairman of the housing and town planning committee of the council, his company would not tender in the future for any building contracts of the council. Further, the justices say: "We were of opinion "that the [defendant] was sincere in his statement to us that "his company did not intend to tender for any further council "work." I cannot think that that can affect the question whether there has been an offence committed or not. It goes very clearly to mitigation but not, I think, to defence, because at any time the defendant and the company could have changed their minds and could have tendered. It is a matter which the justices very properly took into consideration in mitigation and they gave what I think is a very appropriate sentence, namely, an absolute discharge. In my view, the justices, who dealt very ably with a difficult case, came to a correct decision, and I would dismiss this appeal.

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[6] [1956] 2 Q.B. 369, 378.

CASSELS J. I agree. I do not propose to go into the facts of the case but rather to deal with the matter generally. Parliament has certainly since 1882 had the desire to deal with the case of any member of a council who votes or takes part in the discussion of any matter before the council or committee in which he has directly or indirectly by himself or his partner any pecuniary interest. That was continued under section 76 of the Local Government Act, 1933, which has been very frequently referred to during the course of this case, subsection (1) of which provides: "If a "member of a local authority has any pecuniary interest, direct "or indirect, in any contract or proposed contract or other matter, "and is present at a meeting of the local authority at which the "contract or other matter is the subject of consideration . . . ," he must, as early as he can, disclose the fact, take no part in the consideration and discussion and record no vote on any question with respect to the contract or other matter. There is no doubt that the mischief Parliament is aiming at is that members of a local authority should not be, if they have any pecuniary interest direct or indirect, taking such a part in the discussion or voting which might indicate to the public that they were not acting in the public interest, but rather in their own private interest. It is no answer to say that the particular councillor had no pecuniary advantage to obtain by recording his vote. That particular phase of the matter was discussed by Donovan J. in *Brown* v. *Director of Public Prosecutions*[7] when he said, referring to the circumstances of that case: "In those circumstances, no narrow con-"struction ought to be put upon the words 'pecuniary interest' "in their context in section 76 (1); in particular, they ought not "to be construed—and the contrary has not been suggested—as "meaning 'pecuniary advantage.'" The whole object seems to me to be that Parliament requires that members of local authorities, when there comes before that local authority a matter in which they have a peculiar interest which is pecuniary, shall restrain themselves and follow the requirements of section 76, that is, disclose that fact and not take part in the discussion or vote on any resolution. One can well see that the confidence which the public has in local administration would be seriously jeopardized if it was thought that a councillor might get, or a group of councillors put their heads together in order to get, an advantage by reason of their pecuniary interest direct or indirect in the matter under discussion.

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[7] [1956] 2 Q.B. 369, 378.

I am sure the court has been very much obliged to Mr. Wilson for the well-phrased submissions he has made upon this rather difficult question. Also I know that many illustrations can be put forward which perhaps are a little difficult at times to answer, but on the matters that have been mentioned in the course of this case I have no difficulty in arriving at the conclusion that the justices dealt with this matter most efficiently. They convicted, as they were entitled to do, upon what was put before them, and they mitigated by giving an absolute discharge. I also agree with what has been said by the Lord Chief Justice with regard to the defendant. There is no suggestion against his honesty in the matter. He can return to Wisbech feeling that, at any rate, this matter has been well and thoroughly ventilated, and that not a word could be breathed against him for the part he took when this matter was before the council, but, unfortunately, he did have what can be rightly regarded as a pecuniary interest direct or indirect and he should have taken no part at all in the discussion whatever was the part he did take. Councillors, when these matters are coming before their local authority, if I may express a personal opinion, are better absent.

Streatfeild J. I also agree, although I confess that I have been much impressed by the argument of Mr. Wilson as well as fully endorsing the decision of the justices referred to by the Lord Chief Justice that the defendant, in the attitude which he took, was acting perfectly openly and honourably. One is glad that that was reflected in the absolute discharge which the justices gave him, though they felt obliged to record a conviction. But it is for this court to interpret the words of the legislature against the background of what is obviously the mischief aimed at.

Section 76 of the Local Government Act, 1933, is the successor of section 22 of the Municipal Corporations Act, 1882, which was repealed by the Act of 1933. In the Municipal Corporations Act, 1882, the words were as wide as they could possibly be: "A "member of the council shall not vote or take part in the discus-"sion of any matter before the council, or a committee, in which "he has, directly or indirectly, by himself or by his partner, any "pecuniary interest." The corresponding words in the repealing Act of 1933 are: "If a member of a local authority has any "pecuniary interest, direct or indirect, in any contract or proposed contract or other matter . . ." It is argued that the insertion before the words "other matter" of the words "in any "contract or proposed contract" cuts down and narrows in some way the meaning of the words "any other matter." I cannot think that that was the intention of Parliament and, as it seems to me, the words "other matter" have no less wide a meaning than they did under the Municipal Corporations Act, 1882. The test, therefore, is whether the councillor has directly or indirectly a pecuniary interest in the matter under consideration. It is to be implied under subsection (2) that he has such an indirect interest if he is a member of a company with which a contract is made or is proposed to be made, or has a direct pecuniary interest in the other matter under consideration. It seems to me that the sole question is whether the defendant's company had a direct pecuniary interest in the matter which was under discussion proposed by one of the councillors that, in future, the borough engineer should be empowered, indeed, as originally moved, should be obliged, to tender for any building contract in the future. As it seems to me, although the defendant's company under his direction in 1956, when he became vice-chairman of the housing and town planning committee, had decided that in future they were not going to tender for any building contracts for the local authority, they had in fact done work until 1954. Although they had so decided that they would not tender in future, it was at all times open to that company as an existing building firm to reverse that policy, and when a tender was advertised under the rules there was no reason why they should not make a tender in competition with others. In those circumstances, it seems to me that that company, so long as it was a building company and was in a position to tender, had a direct pecuniary interest in matters concerning building contracts by reason of this motion, which would have the effect of the borough engineer tendering in competition with other building contractors. So that, in those circumstances, the defendant himself having indirectly a pecuniary interest in the company, and that company having a direct pecuniary interest in the matter under discussion, came within the words of section 76. For those reasons, therefore, in my view, the interpretation which the justices put upon this section was the correct one.

I would like to add a word or two with regard to *Brown* v. *Director of Public Prosecutions*,[8] to which the Lord Chief Justice has referred. That case was concerned under section 76 with certain councillors, some of whom were actually tenants of the corporation and had lodgers, and with three other councillors who were existing tenants of the corporation but who had no lodgers. It was held in that case that both lots of councillors had a pecuniary interest in the matter which was in that case under discussion. As Donovan J. put it,[9] even those tenants who had no lodgers nevertheless had a potential income-producing asset; in other words, being holders of an actual contract they could at any time if they liked have taken a lodger, and having that tenancy it was a potential income-producing asset. Both Lord Goddard C.J. and, at any rate by inference, Donovan J., contrasted the position of such tenants with members of the council who were not yet tenants and, indeed, who might never become tenants. I cannot help thinking that, in so far as the phrases used in that case by Lord Goddard C.J. and Donovan J. dealt with councillors who were not yet tenants at all, they may be regarded as being obiter, being unnecessary for the decision of the case. Without deciding the point, because the matter has not been fully argued, I would be inclined to think that, in the case of councillors who were not yet tenants of council houses, they were excepted by the proviso to section 76 (1) because they were inhabitants. That matter was not argued and the court in *Brown* v. *Director of Public Prosecutions* held that the proviso did not apply, not on that ground, but on the ground that housing was not a public service within the meaning of the proviso, which, of course, it clearly was not.

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[8] [1956] 2 Q.B. 369.

In my view, the real key to the present case may be found in the concluding words of Donovan J., in referring to those councillors who had houses but no lodgers, when he said[10]: "Their "case is different from a councillor who merely had a hope of "obtaining such a house in the future"—in other words, as inhabitants they might hereafter apply for a council house, which might be or might not be granted; at any rate they would be entitled to ask for one. Here it was an existing building firm in the locality. It had in fact done work for the council until 1954. It was at all times in a position to tender for any building contracts or proposed contracts which might be invited, and in spite of the fact that their policy had been altered for the time being by the defendant it was at all times open to them to reverse that policy and tender in the future. For those reasons, therefore, I think they had more than a hope of obtaining such a contract in

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[9] [1956] 2 Q.B. 369, 378.

[10] Ibid.

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the future; indeed, they had a positive right to tender for it when the tender was advertised. For those reasons, therefore, I do not think this case is governed in any way by *Brown* v. *Director of Public Prosecutions*,[11] and, in my judgment, I have come to the conclusion that the justices were correct in their decision.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills for Dawbarn, Barr & Knowles, Wisbech; Director of Public Prosecutions.*

J. D. P.

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[11] [1956] 2 Q.B. 369.

1958
Oct. 29.

Lord Parker C.J.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* JACK BRADLEY (ACCRINGTON) LTD.

SAME *v.* BRADLEY.

[1957 C. No. 3427.]

[1957 C. No. 3428.]

Revenue — Customs and excise — Forfeiture — Vehicle "used for the "carriage of" goods liable to forfeiture—Oil in fuel tank of vehicle liable to forfeiture—Whether vehicle also so liable—Meaning of "carriage"—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 44), *ss.* 199 (1), 200 (2) (3), 277 (1).

Kerosene which had been delivered to the defendants for home use and on which a rebate of duty had been allowed under section 199 of the Customs and Excise Act, 1952,[1] was found in the fuel

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[1] Customs and Excise Act, 1952, s. 199: "(1) Subject to the next "following section, where any heavy "oils charged with the customs duty "on hydrocarbon oils are delivered for "home use there shall be allowed "thereon a rebate of duty . . ."

S. 200: "(1) If, on the delivery "of any heavy oils for home use, it is "intended to use the oils as fuel for "a vehicle to which this section "applies, a declaration shall be made "to that effect in the entry for home "use and thereupon no rebate shall "be allowed in respect of those oils. "(2) No heavy oils on the delivery of "which for home use rebate has been "allowed shall be used as fuel for a "vehicle to which this section applies "unless there has been paid to the "commissioners, in accordance with "regulations made for the purposes "of this subsection, an amount equal "to the rebate on like oils at the "rate for the time being in force. "(3) If any person uses any heavy "oils contrary to the last foregoing "subsection . . . he shall be liable "to a penalty of three times the "value of the oils or £100, which-

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tanks of a number of the defendants' motor-vehicles. No amount equal to the rebate on the oil had been paid by the defendants to the commissioners and, accordingly, the oil used in the tanks was liable to forfeiture, under section 200 (3) of the Act. On the question whether the vehicles themselves became liable to forfeiture under section 277 (1):—

Held, that the vehicles had "been used for the carriage" of the oil within section 277 (1) (*a*) for the purposes of the commission of the offence, namely, consumption of the oil in the vehicles, for which the oil later became liable to forfeiture; accordingly, the vehicles were also liable to forfeiture.

ACTION.

On January 23, 1957, seven diesel vehicles, the property of the defendants, Jack Bradley (Accrington) Ltd., and one of which the defendant, Egbert Bradley, was the owner, were used as transport vehicles at Preston Docks, Accrington. The fuel tanks of the vehicles were filled with kerosene mixed with Derv. The kerosene was a heavy oil within section 195 of the Customs and Excise Act, 1952, and had been part of a bulk delivery of some 61,500 gallons of kerosene delivered for home use to the defendants. On the delivery, such allowance of rebate of duty was made as was provided for by section 199 of the Act. No payment equal to the rebate on the kerosene in the tanks of the vehicles in accordance with section 200 (2) of the Act had been made, and, therefore, that kerosene was liable to forfeiture under section 200 (3). On July 3, 1957, the defendants were fined £350 each. The Commissioners of Customs and Excise contended that the vehicles were used for the carriage or deposit of the kerosene either at the time when it was liable to forfeiture or for the purposes of the commission of the offence of using it as fuel for a vehicle for which it later became so liable, and therefore the vehicles themselves became liable to forfeiture by virtue of the provisions of section 277 (1) of the Act, and the commissioners claimed condemnation of the vehicles. The two cases were heard together.

"ever is the greater, and the oils "shall be liable to forfeiture."

S. 277: "(1) Without prejudice "to any other provision of this "Act, where any thing has become "liable to forfeiture under the "customs or excise Acts—(*a*) any "ship, aircraft, vehicle, animal, "container . . . or other thing what-"soever which has been used for the "carriage, handling, deposit or con-"cealment of the thing so liable to "forfeiture, either at a time when it "was so liable or for the purposes of "the commission of the offence for "which it later became so liable; and "(*b*) any other thing . . . found with "the thing so liable, shall also be "liable to forfeiture."

Rodger Winn for the commissioners. The oil was in the tanks of the vehicles to be used as fuel and was thus rendered liable to forfeiture. The question is whether the vehicles were "used "for the carriage" of the oil within section 277 (1) (*a*) of the Customs and Excise Act, 1952, and also became liable to forfeiture. The provisions of the Act operate irrespective of mens rea and cover the use of the vehicle for the carriage of fuel by someone other than the owner. If oil intended to be used as fuel for a vehicle is carried on the vehicle as part of the burden, the vehicle is liable to forfeiture. Section 277 contemplates carriage for the purpose of the commission of an offence.

[LORD PARKER C.J. The offence is user. When do you begin to use the oil?]

When you appropriate it by putting it in the tank. It is then liable to forfeiture and the vehicle is being used for its carriage "at a time when it was so liable" and is also liable to forfeiture. Alternatively, the fuel oil becomes liable to forfeiture at the point of time when each respective molecule is consumed and is carried in the tank to enable it to be so consumed.

J. di V. Nahum Q.C. and *Harry Hague* for the defendants. There is a confusion between section 200 (3), which speaks of user, and section 277 (1), which is concerned with "carriage." Under section 200 (3) oil is liable to forfeiture if used as fuel for a vehicle, but unless the case comes within section 277 the vehicle cannot be forfeited. Consumption of oil in the tank is not "carriage." The object of section 277 is to make liable to forfeiture vehicles carrying goods which are not being consumed. Where the section speaks of "used for the "carriage," it means used for carrying oil as a load, not as the means of propulsion. [Reference was made to *De Keyser* v. *British Railway Traffic and Electric Co.*[2]] In *Tuck & Sons* v. *Priester*[3] Lord Esher M.R. said that if there was a reasonable interpretation of a section imposing a penalty, which would avoid the penalty, the court should adopt that construction. In the present case section 277 should not, in the circumstances, be so construed as to make the vehicles liable to forfeiture. In *Graham* v. *Baldrick*[4] Andrews C.J., dealing with the objects of the Acts, says that in his opinion the words "importation, landing, removal "or conveyance" in section 202 of the Act of 1876, which was replaced by section 277 of the Act of 1952, were intended to refer

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[2] [1936] 1 K.B. 224; 52 T.L.R. 73.

[3] (1887) 19 Q.B.D. 629.

[4] [1949] N.I. 155, 158.

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to four different stages in connection with the conveyance for disposition of goods. When the Act of 1876 was replaced by the Act of 1952, what had to be forfeited were vehicles which were used for the transportation and disposition of goods in specie. It was never intended that the section should cover the use of fuel for the propulsion of the vehicle. In neither of the Acts does there appear to be any reference to incidental carriage as opposed to carriage for disposition. Imagine a nose-bag on a horse containing uncustomed oats in it; can it be said that the horse would be forfeited?

[LORD PARKER C.J. Suppose the owner of the horse was going on a long journey and had the oats in a sack for use during the journey.]

The position would be the same as in the case of spare fuel cans on a vehicle. It would amount to incidental carriage. The Customs Acts are not meant to deal with incidental carriage, but are concerned with transfer and disposition.

[LORD PARKER C.J. Suppose this fleet of lorries had a tanker which was used to carry uncustomed kerosene to be used in the vehicles. Would it be forfeitable?]

If company A owned a tanker and delivered the fuel in it to company B for use in their vehicles, then it might be forfeitable.

Rodger Winn in reply. The operative and essential words " has been used for " in section 277 mean, use has been made of the vehicle for the carriage. There is nothing in the statute about any conveyance for disposition as relied on by Andrews C.J. He was concerned to show that the word " conveyance " excluded exportation. Section 278 provides that a ship of 250 tons or more is not forfeitable unless the offence was substantially the purpose of voyage. That may imply a recognition of safeguards to large ships and that otherwise large ships would have been caught by the very wide provisions of section 277.

LORD PARKER C.J. This is a claim by the Commissioners of Customs and Excise for the condemnation of certain vehicles, the property of the defendants, which they seized as forfeited. The case concerns the use by the defendants, who are garage proprietors and have a fleet of lorries, of kerosene which can be used mixed with fuel oil in tanks for the fuel of the lorries.

The position under the legislation is that kerosene is used largely for domestic and agricultural purposes and for stationary engines such as cranes, excavators and heating plant, and, so long as it is used for those purposes, the legislature has seen fit to say that no duty is payable. On the other hand, when it is used in connection with moving engines duty is payable, and because the latter use is comparatively small it is provided that kerosene which is delivered for home use is allowed a full rebate of duty and, so long as it is used for the permitted purposes no duty becomes payable. But if it is used for moving vehicles as fuel in tanks, then it becomes subject to duty. [His Lordship read section 200 of the Customs and Excise Act, 1952, and continued:] So far as the facts of this case are concerned, all that need be stated is that some of the defendants' lorries were found working at the docks with tanks containing kerosene mixed with diesel oil and that was not kerosene in respect of which the defendants had made any declaration or in respect of which they had paid duty as provided by section 200 (2), and, accordingly, by subsection (3) the oil became liable to forfeiture and the defendants became liable to a penalty. They were prosecuted and fined, but I am concerned solely with the question of forfeiture.

The oil being subject to forfeiture, the question arises whether the commissioners are, in addition, entitled to forfeit, as they claim to do, the vehicles themselves, and that depends on the true construction of section 277 of the Customs and Excise Act, 1952. So far as material it reads as follows: "(1) Without prejudice "to any other provision of this Act, where any thing has become "liable to forfeiture under the customs or excise Acts—(*a*) any ". . . vehicle . . . container . . . or other thing whatsoever which "has been used for the carriage . . of the thing so liable to for-"feiture, either at a time when it was so liable or for the purposes "of the commission of the offence for which it later became so "liable; and (*b*) any other thing . . . found with the thing so "liable, shall also be liable to forfeiture." It is clear, and, indeed, admitted, that there was a contravention of section 200 (3), and that the oil in the fuel tanks became liable to forfeiture. The question then becomes whether, under section 277, the vehicles had been used for the carriage of that oil, either at a time when it was liable to forfeiture, or for the purposes of the commission of the offence for which it later became liable to forfeiture. It is not an easy point and one must bear in mind that powers such as these, if they are to be taken and exercised by the commissioners, must be in clear language.

It has been argued forcibly by Mr. Nahum that "carriage," in the ordinary way, means carriage of the thing or the goods as a cargo, from one point to another for use there or for distribution, and that it is quite inapt to cover the incidental carriage of fuel for the purposes of being consumed on the journey. He points to the ordinary use of the word "carriage"; refers to the previous legislation, the Customs Consolidation Acts of 1853 and 1876; points out that the Act of 1952 is a consolidating statute, and says that there is no reason to treat "carriage" other than as conveyance of the goods as a cargo for the purposes of distribution. "Carriage," of course, is a very wide word, which can be used to cover an incidental carriage of goods as well as a whole cargo of goods. It need not convey the notion of something loaded on a vehicle, but can include anything so long as it is carried on the vehicle.

I think the crux of this case is the construction of the words "which has been used for" that carriage. Clearly, if that meant a vehicle which had been used for the object or with the intention or purpose of carrying something from "A" to "B," then the purposes for which these vehicles were being used being purposes in connection with the docks, it was only incidentally that they were carrying oil at the time. The purpose of carrying oil being for consumption and not for taking it from one place to another. But I do not think that the words are used in that sense. It seems to me that they are used—and one would expect them to be used in a statute of this sort—as meaning "where use has been made "of the vehicle to carry," or "where a vehicle has been made "use of in the carriage of." Indeed, some support for that view is to be obtained from considering section 278, which is dealing with forfeiture of large vessels, and there forfeiture cannot take place unless the offence in connection with which the forfeiture is claimed was substantially the object of the voyage during which the offence was committed.

Looked at in that way it seems to me that, as a matter of English, what happened here comes directly within the words "which has been used for" in section 277 (1) (*a*), because it can be said that use was made of these vehicles for carrying the oil for the purposes of the commission of the offence for which the oil later became liable to forfeiture. The offence is the use of oil. I am not deciding whether it may not be right to say that use is made of oil when it is appropriated to a particular purpose, the unauthorised purpose. One thing, at least, is clear, that oil is used when it is consumed, and, that being so, I cannot see why, as an ordinary matter of language, use was not being made of the vehicles to carry oil for the purposes of that oil being consumed, which itself was the offence for which the oil later became liable to forfeiture. Looked at in that way it seems to me that the plain words of the section cover this case.

I should add that section 277 is a general section covering, and intended to cover, the case of vehicles, ships, containers and other matters used in connection with a number of other offences which have been set out in the statute, and I should have thought that the second limb of section 277 (1) (*a*) contemplates that one may properly have uncustomed goods in this country, but that if some particular use is made of them they become subject to duty, and the words "for the purposes of the commission of "the offence for which it later became liable" are clearly covering just the present sort of case, where the ordinary use of oil is one which does not attract duty, but if it is used for a particular purpose, then duty is payable and, if not paid, an offence is committed.

I think that the oil in these tanks was being carried for the purposes of the commission of the offence, namely, consumption, for which it later became liable to forfeiture. Accordingly, in my view, the seizure was correct and the commissioners are entitled to the condemnation sought.

Order accordingly.

Solicitors: *Solicitor, Commissioners of Customs and Excise; Sharpe, Pritchard & Co., for Richard Pate & Co., Accrington.*

J. D. P.

GRAHAM *v.* C. E. HEINKE & CO. LTD.

[1956 No. G. 2130.]

C. A.

1958
Nov. 26.

Lord Somervell, Morris and Pearce L.JJ.

Practice and Procedure—Payment into court—Notice—Form—Factories Act and common law claims—Whether causes of action must be specified in notice of payment in—R.S.C., Ord. 22, *r.* 1 (2).

R.S.C., Ord. 22, r. 1 (2), provides: "Where . . . money is paid "into court in satisfaction of one or more of several causes of action "the notice shall specify the cause or causes of action in respect of "which payment is made . . ."

In an action in which the plaintiff claimed damages for personal injuries alleged to be due to the defendants' negligence at common law and breach of statutory duty, the defendants, before delivering

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their defence, made a general payment into court without specifying the cause of action in respect of which the payment was made. The plaintiff did not take the money out and the trial judge awarded him a sum less than the payment in and directed that the defendants should have the costs of the action after the date of the tender.

The plaintiff appealed, asking for increased damages and also contending that the payment in must be regarded as a nullity, since it did not comply with Ord. 22, r. 1 (2), by specifying the cause of action in respect of which the payment was made:—

Held (on the point of law), that the purpose of Ord. 22, r. 1 (2), was to avoid embarrassment, in the technical sense, when damages were claimed under two or more independent causes of action, in cases where the relief claimed was cumulative. Where, as in the present case, the two causes of action were alternative methods of claiming the same relief, the embarrassment which the rule was designed to prevent did not arise, and the rule was inapplicable.

Decision of Donovan J. [1958] 1 Q.B. 432; [1958] 2 W.L.R. 224; [1958] 1 All E.R. 365 on the point of law affirmed; award of damages increased.

APPEAL from Donovan J.[1]

On December 5, 1956, the plaintiff, Reuben Graham, commenced proceedings against his employers, C. E. Heinke & Co. Ltd., for damages for personal injuries sustained while in their employment, which he contended were due to their negligence and/or breach of statutory duty under the Factories Act. On December 28, 1956, before the delivery of their defence, the defendants paid into court under R.S.C., Ord. 22, r. 1, £1,000 and gave notice of the payment to the plaintiff in the following terms: "Take notice "that the defendants, Heinke & Co. Ltd., have paid into court "£1,000 and say that that sum is enough to satisfy the plaintiff's "claim." The plaintiff did not take out that sum.

At the trial of the action the defendants admitted a breach of section 14 of the Factories Act, 1937, but charged the plaintiff with contributory negligence.

Donovan J. found in the plaintiff's favour on the claim, but having awarded only £760 damages he directed that the defendants should have the costs after the date of the payment in. He rejected the plaintiff's contention that the notice of payment in did not comply with the terms of Ord. 22, r. 1 (2), since it did not specify the cause of action in respect of which the payment was made, and should therefore be treated as a nullity.

The plaintiff appealed.

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[1] [1958] 1 Q.B. 432; [1958] 2 W.L.R. 224.

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F. W. Beney Q.C. and *Leonard Halpern* for the plaintiff. The figure awarded by the judge is too low, and the payment into court was not a valid payment. Ord. 22, r. 1 (2), provides: "Where . . . money is paid into court in satisfaction of one or "more of several causes of action the notice shall specify the "cause or causes of action in respect of which payment is made "and the sum paid in respect of each such cause of action unless "the court or a judge otherwise order." The plaintiff claimed damages for negligence at common law and for breach of statutory duty. Those were two separate causes of action and the House of Lords have so decided. The payment in must therefore be treated as a nullity. [*London Passenger Transport Board* v. *Upson* [2] and *Nolan* v. *C. & C. Marshall Ltd.*[3] were referred to.]

Stephen Chapman Q.C. and *John Stocker* for the defendants. The judge, having heard the evidence, came to the conclusion that so far as loss of future earnings by the plaintiff was concerned, there was nothing to take into account in assessing the damages. Unless this court increases the award, the point of law under Ord. 22, r. 1, does not arise, but counsel on both sides hope that a ruling on the point will be given. The rule, it is submitted, must be restricted to cases where there are two or more independent causes of action giving rise to separate and cumulative claims for damages. It does not apply where, as here, the causes of action are alternative methods of claiming the same relief. This court should put on the phrase "causes "of action" the same meaning as Lord Wright put on it in *Lochgelly Iron and Coal Co.* v. *M'Mullan.*[4]

LORD SOMERVELL, having stated that in his opinion the award of £760 damages was insufficient, and should be increased by £400, continued: A preliminary point was taken on Ord. 22, r. 1 (1), which provides: "Payment into court. 1. (1) In any "action for a debt or damages or in an Admiralty action the "defendant may at any time after appearance upon notice to "the plaintiff pay into court a sum of money in satisfaction of "the claim or (where several causes of action are joined in one "action) in satisfaction of one or more of the causes of action; "provided that with a defence setting up tender before action

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[2] [1949] A.C. 155, 168; 65 T.L.R. 9; [1949] 1 All E.R. 60.

[3] [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389.

[4] [1934] A.C. 1, 25; 49 T.L.R. 566.

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"the sum of money alleged to have been tendered must be "brought into court." By rule 1 (2): "Where the money is "paid into court in satisfaction of one or more of several causes "of action the notice shall specify the cause or causes of action "in respect of which payment is made and the sum paid in "respect of each such cause of action unless the court or a judge "otherwise order."

I should have said that, on the conclusion I have come to on the first point as to quantum, this point does not arise, because the amount would then be in excess of the amount paid into court; but counsel on each side asked us, if we came to a conclusion on the point, to express it; and although normally I think it is desirable not to decide matters which one does not have to decide, it is right to express the view which I and my brethren hold on this point, which may quite often arise.

The claim here was, as so often arises in these cases, a claim for negligence, or alternatively, for breach of statutory duty; and the point taken was that as the payment into court did not specify the cause or causes of action in respect of which the payment was made, therefore it was a bad payment in, and that leave ought to have been obtained from a court or a judge. One sees, of course, how the point arises on the wording of the rule; but any rule, or, indeed, any document, falls to be construed in the light of its purpose, to be gathered from its terms.

The purpose of this rule is to avoid embarrassment, in the technical sense, when damages are claimed under two or more independent causes of action, in cases where the relief claimed is cumulative. A man is claiming under cause A and cause B, and if he wins on both, gets x plus y in damages. If a sum of money is paid into court, it is difficult for him to know what to do if he does not know how much is allocated to cause A, and how much to cause B. If £250 is allocated to cause A, he may say: "That is all I hope to get under that, so I will take that sum out, "and that will be the end of that." The case will then proceed on cause B. That obviously is the problem with which the rule is intended to deal. But in cases such as this, where the relief claimed is not cumulative, but where the two causes of action are alternative methods of claiming the same relief, not only can the embarrassment which the rule is designed to prevent not arise, but it would also be impossible to comply with the rule by allocating part of the sum paid in to one, and part to the other of the two alternative causes of action. On that point, therefore, I think that the judge was right in deciding that there had been no breach of the rule.

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MORRIS L.J. I entirely agree.

PEARCE L.J. I agree.

Judgment varied by increasing damages to the sum of £1,160.

Solicitors: *King-Hamilton & Green; Kingsbury & Turner.*

A. W. G.

In re D., AN INFANT.

[Plaint No. 01229.]

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Nov. 28.
Lord Denning; Hodson and Ormerod L.JJ.

Adoption—Applicant—Mother of illegitimate child—Jurisdiction—Considerations for exercise of court's discretion—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 1 (3), 2 (1) (*c*), 12 (2).

The court has jurisdiction under the Adoption Act, 1950,[1] to make an adoption order in favour of the mother of an illegitimate infant, if it is satisfied that in all the circumstances such an order will promote the welfare of the infant.

Where, therefore, a single woman appealed against the refusal of a county court judge to make an adoption order on her application to adopt her own child, which application was supported by the local authority as guardian ad litem on the ground that the mother was "anxious to remove the stigma of illegitimacy from "the child":—

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[1] Adoption Act, 1950, s. 1 (3): "An adoption order may be made "authorising the adoption of an infant by the mother or father of the "infant, either alone or jointly with "her or his spouse."

S. 2 (1): "An adoption order "shall not be made in respect of an "infant unless the applicant or, in "the case of a joint application, one "of the applicants— . . . (*c*) is the "mother or father of the infant."

S. 12 (1): "Where an adoption "order is made in respect of an "infant who is illegitimate, then, "subject to the provisions of this "section, any affiliation order or "decree of affiliation and aliment in "force with respect to the infant, "and any agreement whereby the "father of the infant has undertaken "to make payments specifically for "the benefit of the infant, shall "cease to have effect, but without "prejudice to the recovery of any "arrears which are due under the "order, decree or agreement at the "date of the adoption order."

(2): "Where an infant to whom "any such order, decree or agreement as aforesaid relates is "adopted by his mother, and the "mother is a single woman, the "order, decree or agreement shall "not cease to have effect by virtue "of the foregoing subsection upon "the making of the adoption order, "but shall cease to have effect if "she subsequently marries."

Held, allowing the appeal, that in the exercise of the court's discretion the order should be made, for though an adoption order could not render an illegitimate child legitimate, other advantages, actual and potential, for the child, flowed from such an order.

Per Hodson L.J. The paramount object of the Adoption Act, 1950, is the welfare of the child.

APPEAL from Judge Clothier, Lambeth County Court.

The mother of an infant illegitimate child applied to the county court for an adoption order to be made in her favour under the Adoption Act, 1950. Her application was supported by the children's officer to the local authority, the London County Council, as guardian ad litem. The confidential report of the local authority (which was in evidence before the court) was in the following terms: "No affiliation order has been made against "the father and no person is liable by virtue of an agreement to "contribute towards the support of the infant. There is no order "in force or resolution committing her to the care of local "authority. The infant has no right or interest in any property; "she is insured with the Prudential Assurance Company under "an endowment policy for £19 14s. payable after 16 years. The "female applicant is employed as a housekeeper by a Miss [R.] "and receives a weekly wage of £2 10s. in addition to all "residential emoluments. The house is modern . . . very comfortably furnished and clean. The infant at present is sleeping "in a cot in her mother's bedroom; an adjacent room is available "for her use later. The female applicant enjoys good health and "there is no known history of hereditary disease. She is anxious "to remove the stigma of illegitimacy from the child. . . . The "care bestowed upon the infant is satisfactory, and as an adoption "order would appear to be in the infant's best interests, it is "recommended that a full order be made."

On the hearing of the application, the county court judge said: "The report by the child welfare officer in support of the application states that 'she' (i.e., the mother) 'is anxious to remove "'the stigma of illegitimacy from the child'; and no other reason "for, or advantage to be gained from, the proposed adoption was "advanced either by the applicant herself or by the welfare "officer. Indeed, I gathered from the mother that she herself "considered that she already had all necessary rights and duties "in regard to her child without an adoption order; but I was also "informed that a society which assists unmarried mothers had "obtained some 29 adoption orders in similar cases in different "parts of the country and was disposed to treat a refusal by me "to make an adoption order as somewhat of a test case.

"I refused to make an adoption order in this case for the "following reasons: (1) The Adoption Act, 1950, is not designed "or intended to be used simply for the purpose of 'removing the "'stigma of illegitimacy.' (2) An adoption order if granted in "this case would no doubt soon become common form, and "illegitimacy would automatically be abolished in this country. "(3) It is doubtful whether it would be in the public interest that "the 'stigma' (sic) of illegitimacy should be capable of removal "in every case by the simple expedient of the unmarried mother "adopting her own child. (4) The Legitimacy Act, 1926, which "provides for legitimation where the parents of an illegitimate "child subsequently marry, prescribes somewhat stringent conditions which greatly restrict the cases in which 'the stigma of "'illegitimacy' can be removed even by the subsequent marriage "of a child's parents. I see no reason to suppose that the "Adoption Act is intended or calculated to grant that universal "legitimation (by the simple expedient of a mother's adoption "order) which the Legitimacy Act, 1926, expressly denies in some "cases even to the (subsequent) marriage of the child's parents. "(5) I am aware that section 1 (3) of the Adoption Act, 1950. "may be argued to enact that even without having a 'spouse' "a mother may adopt, by herself, her illegitimate child. But if "that subsection does in fact authorise such an adoption, its "application should be limited to special cases. There might. "for example, be a case in which a 'power of appointment' to "'children' might be expected to be created in favour of, and to "become vested in, a woman. In such a case, it might, or might "not, be desirable to allow the woman to adopt her own illegitimate child so that the child might ultimately benefit from the "exercise, or failure to exercise, the power of appointment. "(6) The grant of an adoption order is discretionary (section 1 (1) "of the Adoption Act, 1950). But the claim in this case is that "the unmarried mother has virtually a right to an adoption order "without proving any circumstances other than that the infant "is her child. I do not think the Act intended this." The county court judge accordingly refused the order.

The mother appealed, her appeal being supported by the local authority as the guardian ad litem.

Richard Vick for the applicant mother. The applicant is a suitable person and can provide properly for the child; she is housekeeper to two single ladies who are most anxious to do everything they can to help the mother and the child and have plans for the child's future education. The judge misdirected himself in holding that the Adoption Act, 1950, did not apply to the facts of this application. "Mother" in section 1 (3) of the Act would include a natural mother; and "alone" in the same subsection must mean this kind of mother. The Act makes provision for this very case of an unmarried mother wishing to adopt her own child: see also the words in section 12 (2): "adopted by his mother, and the mother is a single woman." Whereas an illegitimate child has a surname only by reputation, an adopted child has the legal surname of the adopter. Some schools inquire into the paternity of the child, but when a child is adopted, there is the great advantage that they simply look at the adoption certificate.

[ORMEROD L.J. The child is entered in the Adopted Children's Register and an entry therein is received as if it were an entry in the Register of Births.]

Yes; moreover, adoption removes the necessity for the subterfuges often resorted to by unmarried mothers; such a mother may call herself by her own name openly, and, when the day comes to explain the circumstances to the child, it makes that task much easier.

The order made in the exercise of the judge's discretion on the facts of this case was not a judicial exercise of the discretion. He addressed his mind to the question as to how such an order would affect the mother rather than to the advantages which would accrue to the child. He has not considered the conditions of the home, but has attempted to equate the position of an illegitimate child under the Legitimacy Act, 1926, with that of a child, the subject of an adoption order under the Adoption Act, 1950. But adoption is a status entirely different from legitimation. This child will never be legitimate. On the other hand, it may derive advantages in respect of property as an adopted child which do not accrue under the Legitimacy Act, 1926. Under section 9 of the Act of 1926 an illegitimate child can take if its mother dies intestate and leaves no legitimate children; but that section is very restricted, whereas under the Act of 1950 an adopted child takes on an intestacy as if it were a legitimate child of the adopters: see section 13.

In *In re Fletcher, decd., Barclays Bank Ltd.* v. *Ewing*[2] Roxburgh J., at a date before the Act of 1950, stated that applications of this nature were quite common; and orders have been made up and down the country by county court judges in similar circumstances. The county court judge here was wrong in holding that section 1 (3) applied only to a special case, and his order made in the exercise of his discretion under the Act has resulted in a miscarriage of justice.

H. E. Francis for the guardian ad litem, the local authority. The guardian ad litem, appointed pursuant to section 8 (4) of the Act of 1950, has performed the duties of inquiry laid on him by rule 7 of the Adoption of Children (County Court) Rules, 1952 (County Court Practice, 1958, p. 1234) (S.I. 1952, No. 1258), and has recommended that a full adoption order be made. His confidential report was before the county court judge and is before this court. The phrase to which the judge took objection about the mother being " anxious to remove the stigma of illegitimacy " from the child " indicates that the applicant wanted not so much to avoid embarrassment to herself as to improve the status of her child who has the prospect of a settled home with a professional lady who is anxious to give it a good education. It is clearly in the child's interest to be given the status of an adopted child rather than remain as an illegitimate infant.

Thirteen such orders have been made in the London County area since 1953 where single women applied for adoption orders for their own children; and on February 8, 1957,* this court allowed an appeal from the county court judge at Kingston-upon-Thames where an order had been refused in similar circumstances. The judge's note of his reasons shows that the point in favour of an adoption order, namely, that such a child could take on his mother's intestacy on the same footing as other children, was not drawn to his attention but that it did occur to him later. That is a potential advantage which should not be disregarded when the court considers whether or not in the exercise of its undoubted discretion under the Act such an order should be made. The guardian ad litem submits that the appeal should be allowed.

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[2] [1949] Ch. 473, 481; [1949] 1 All E.R. 732.

* *Note*: In *In re S., an Infant*, Judge Reid, sitting at Kingston-upon-Thames County Court on November 22, 1956, refused to make an order in similar circumstances. A note of his reasons for his decision was prepared by the county court judge for the assistance of the Court of Appeal on the hearing of the appeal in camera on February 8, 1957, as follows: " The Adoption of " Children Act, 1926 (now replaced " by the Act of 1950) introduced a " new element into English law. " Adoption orders involve serious " legal and social consequences, the " full implications of which may not " even yet have become fully " apparent. It seemed to me there" fore that an adoption order is not " an order lightly to be made. To " exercise the jurisdiction conferred " by the Act merely as an instrument " for the concealment of feminine " frailty, and as a matter of social " convenience to save the applicant " from possible embarrassing ex" planations seemed to me not to " be a proper use of the power con" ferred on the court. Accordingly I " dismissed the application. . . . " Some time after the application " had been disposed of, it occurred " to me that an adoption order might " be said to strengthen the legal " position of the child in that it " would entitle him to take under his " mother's intestacy. This was not " present to my mind at the time of " the application nor did anyone " who appeared before me suggest it " as a relevant consideration."

Lord Denning. In this case the mother of an illegitimate child seeks an adoption order. The judge has refused it. She appeals to this court.

The mother is 34. The child, a girl, was born on January 14, 1956, so that the child is nearly three years old. The father was a married man living with his wife. The mother has had no communication with the father since the child was born, and she has not tried to make him responsible for the support of the child.

The mother, when the child was 18 months old, obtained employment as resident housekeeper with a woman who lives in the south of London, and receives a wage of £2 10s. a week and full keep of her daughter and herself. The child and the mother each have a bedroom, and the child's room has been completely decorated and furnished by the employer. There is a good garden. There is another woman who lives in the house with the employer, and there is no doubt that these two women are very much attached to the child and very much interested in her welfare and education and want the mother and the child to continue to live with them.

When the mother applied for an adoption order so that the child could be adopted by her, the case was inquired into, as the rules provide, by the welfare officer of the London County Council, who reported, after stating the facts, that the care bestowed on the infant was satisfactory, and that the adoption order would appear to be in the infant's best interests, and he recommended that a full order should be made. But when the case was inquired into by the county court judge, he refused to make the order. He pointed out that the welfare officer in his report had said that the mother was anxious to remove "the stigma of "illegitimacy" from the child. He said: "No other reason for, "or advantage to be gained from, the proposed adoption was "advanced either by the applicant herself or by the welfare "officer." He refused to make the order because he said the Adoption Act, 1950, was not "designed or intended to be used "for the purpose of removing the stigma of illegitimacy, and that "if an adoption order were granted in this case it would no doubt "become common form and illegitimacy would automatically be "abolished in this country."

I find myself unable to agree with the reasoning of the judge. If one reads the words of section 1 of the Adoption Act, 1950, it is plain to my mind that it contemplates an adoption order being made in the circumstances which are now before the court. Section 1 (3) provides: "An adoption order may be made authorising "the adoption of an infant by the mother or father of the infant, "either alone or jointly with her or his spouse." Section 2 (1) says: "An adoption order shall not be made in respect of an "infant unless the applicant" is over a certain age or "is the "mother or father of the infant." Those sections seem to me to contemplate this very case. But the matter is carried much further by section 12 (2) of the Act, which says: "Where an "infant . . . is adopted by his mother and the mother is a single "woman" and has obtained an affiliation order against the father that order "shall not cease to have effect . . . upon the making "of the adoption order." That shows that if the mother of an illegitimate child gets an affiliation order against the father, and afterwards gets an adoption order herself, the order against the father still operates, so as to make him pay for the child.

The judge has asked what advantage is gained by making an adoption order. In property matters there are several potential advantages. An illegitimate child, according to the old common law, was a child of nobody, so that if the mother, grandmother or grandfather died without making a will, none of their property would ever go to the illegitimate child, because it was no relation in law to them. It was of no kin to anyone. If money was left to children by will it did not go, as a rule, to an illegitimate child, since the word "children" was nearly always construed as referring only to legitimate children. That old law has been altered in part, but only in a very small part, by section 9 of the Legitimacy Act, 1926. Now, if the mother of an illegitimate child dies without leaving a will, and has no legitimate children, the illegitimate child can take as next-of-kin of the mother. That is the only alteration. In all other respects the old law remains. If the mother of an illegitimate child marries and has legitimate children, the illegitimate child is still excluded on an intestacy:

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whereas, if an adoption order is made, the illegitimate child ranks equally with the other legitimate children. Again, if the mother dies before the grandmother, and the grandmother dies intestate, the illegitimate grandchild is excluded from any benefit in the grandmother's estate: whereas, if an adoption order is made, it will be entitled to a share. Again, if the mother, or anyone else, leaves a will leaving money to the "children" of this mother, it will probably be so construed that the illegitimate child will take nothing: whereas if an adoption order is made, it will rank as a child in the full sense of the law. So it does make a considerable difference if an adoption order is made.

The judge seemed to think that by making an adoption order the child is rendered legitimate. That is not the case. Illegitimacy and adoption are entirely different matters. The child still remains illegitimate, but, being adopted, it becomes in law for all purposes a child of its mother and suffers none of the disabilities which attach to illegitimacy.

Furthermore, as Ormerod L.J. pointed out, the child, when adopted, is registered in the Adopted Children's Register, and that entry is received in evidence as if it were an entry in the Register of Births; so that if an application has to be made for the child to go to a school, or any other place where the entry is necessary, the entry in the Adopted Children's Register can be used.

Thus it seems to me clear that there are advantages to the child if an adoption order is made. There must, of course, always be an inquiry whether the mother is a suitable person to be given an adoption order and whether the home is suitable. All the circumstances must be taken into account; but it is certainly no bar that the child is illegitimate.

I am glad to find that this court came to the same conclusion in 1957 * in another case where the county court judge had taken the same view as Judge Clothier has taken here. The case was heard in camera so that it was not reported, and there is no record of the judgment, so far as we can find, anywhere. If it had been reported, we should not have had occasion to hear this case, because everybody would have known what the position was. We have been told that up till now 87 adoption orders have been made in favour of mothers of illegitimate children. By our decision today we affirm that those orders have been rightly made within the jurisdiction of the county court judges concerned.

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* See Note, ante, p. 233.

I think that this appeal should be allowed and an adoption order should be made.

HODSON L.J. I agree. The main question which arises on this appeal came before this court, of which I was a member, on February 6, 1957,* where a county court judge had refused to make an adoption order on the application of an unmarried mother on the ground that he did not think the Adoption Act, 1950, should be used to cover up the frailty of women placed in such circumstances. That really is the situation here; but it ought to be made plain that the Adoption Act, 1950, to the sections of which my Lord has referred, contemplates by the very terms of the Act itself in section 1, section 2 and section 12, that an unmarried mother may well be the applicant for an adoption order. The exercise of the discretion of the court is required to ascertain whether the mother or the applicant for the adoption order is able to look after the child and attend to the welfare of the child, the welfare of the child being the paramount object of the Act. In the present case, it is clear that the child will be well cared for in the home in which the mother is, where she is in the employment of a good employer who has done her best for the child and obviously has the welfare of the child at heart. Indeed, the welfare officer of the London County Council, who has reported to the court, supported the application, as he was satisfied as to the prospects of the future welfare of this child. Therefore, there is no doubt that, in the exercise of the court's discretion, this order ought to be made.

It only remains to emphasise that an applicant for an adoption order in such circumstances is not handicapped by the fact that she herself is the unmarried mother of the child she seeks to adopt.

ORMEROD L.J. I agree, and there is nothing I wish to add.

Appeal allowed.
Adoption order made.

Solicitors: *William Sturges & Co.; J. G. Barr, London County Council.*

M. M. H.

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* See Note, ante, p. 233.

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Diplock J.

SOUTH AFRICAN DISPATCH LINE *v.* OWNERS OF THE PANAMANIAN STEAMSHIP *NIKI.*

Shipping — Charterparty — Demurrage — Exceptions clause — Charterparty providing for shipment of wide variety of cargo in Coos Bay/British Columbia range—Exceptions clause excusing charterers from "any delay if cargo intended for shipment . . . cannot be . . . "loaded . . . by reason of . . . strikes . . . "—Strike preventing loading of intended cargo of lumber—Extent of delay covered by clause—Charterers' duty to provide alternative cargo within reasonable time.

Ships' Names—Niki.

A single voyage charterparty of a ship provided for shipment in four districts in the Coos Bay/British Columbia range, loading rotation to be at the charterers' option, of a cargo of lumber and/or timber and/or wheat in bulk and/or lawful merchandise, excluding dangerous cargo. The charterparty contained an exceptions clause providing " . . . Charterers shall not be responsible for any delay "if the cargo intended for shipment under this charterparty "cannot be provided, delivered, loaded or discharged by reason "of . . . strikes . . . connected in any way with, or essential to "the providing, delivery, loading or discharging of the cargo . . ."

On June 13, 1952, the charterers booked a cargo of lumber at Victoria, British Columbia, intending on that day to order the ship first to Vancouver to load wheat, thence to Victoria to load the lumber, and thereafter to two American ports to complete loading, but on June 16 a strike broke out which prevented the loading of lumber at all British Columbia ports.

The issue whether the owners would have been allowed to count time lost at Victoria because of the strike as laytime if the vessel had loaded the intended cargo was referred to arbitration, and the umpire, holding that the charterers would have been protected by the exceptions clause from responsibility for delay in loading caused by the strike, made his award in their favour.

On appeal by the owners:—

Held, allowing the appeal, that, since the charterparty permitted the loading of a selection of different cargoes, if the intended one of those could not be provided, the charterers were under a duty to provide another; and that, although the exceptions clause would excuse delay in loading lumber (the intended cargo), it did not excuse a failure to load an alternative type of cargo, the loading of which was not affected by the exceptions clause: that clause excused only delay in loading for such time as was reasonably required for the charterers to make arrangements to obtain and make ready for loading an alternative type of cargo.

Bunge y Born Limitada Sociedad v. *Brightman & Co.* [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876 applied.

SPECIAL CASE stated by an umpire.

A dispute arose between the owners of the Panamanian Steamship *Niki* and South African Dispatch Line, charterers of the ship, in connection with a charterparty dated June 3, 1952, for a single voyage for a lump sum freight of 185,000 dollars. The dispute was submitted to arbitration in accordance with clause 32 of the charter and an umpire gave his award in the form of a special case.

Under the terms of the charterparty the *Niki* was to proceed for shipment to four districts "in Coos Bay/British Columbia "Range within British Institute Warranty limits . . . maximum "six berths; as ordered by charterers, loading rotation to be "North/South or South/North at charterers' option, with "charterers' option of commencing loading on the Columbia "River or Coos Bay, then British Columbia, thence South to "Columbia River to complete . . ." and a wide range of alternative rotations was provided for. Orders for first loading were to be given by wireless on Captain's application four days before due off Estevan wireless station and the cargo to be loaded was "a full and complete cargo of lumber and/or timber and/or wood "goods and/or wheat in bulk and/or lawful merchandise, excluding dangerous cargo and explosives . . ." for shipment to "four "safe ports in Cape Town/Lourenço Marques range. . . ."

Clause 4 (the exceptions clause) provided: " . . . Charterers "shall not be responsible for any delay if the cargo intended for "shipment under this charterparty cannot be provided, delivered, "loaded or discharged by reason of . . . strikes or lockouts of "any class of workmen or stoppage of labour connected in any "way with, or essential to the providing, delivery, loading or "discharging of the cargo. . . ."

By clause 7 cargo was to be loaded in 14 weather working days, laydays at first loading port to commence 24 hours after receipt of notice of readiness to load, and there were similar provisions for subsequent loading ports. Clause 8 provided for 25 days' discharging time, and by clause 9 loading and discharging time were to be reversible. Clause 23 provided that laydays were not to commence before July 25 and the cancelling date was July 19.

According to an agreed statement of facts annexed to the special case, on June 13, 1952, the charterers booked 540 mille lumber for shipment at Victoria, British Columbia. They had certain prior commitments and their intention on and after June

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13 was to load the following cargo on the *Niki* under the charterparty: at Vancouver—4,050 tons wheat, at Victoria—540 mille lumber, and at Coos Bay, and thereafter at Portland, Oregon, U.S.A., to complete with lumber from two other shippers.

On June 16, 1952, a strike of lumbermen broke out in British Columbia which prevented the loading of timber in British Columbia ports. The strike did not affect any United States ports or places within the charter loading range nor did it prevent or delay the loading of wheat in bulk and/or other lawful merchandise at any British Columbia and United States ports or places within the charter loading range. The charterers were in fact able to load 4,900 tons of wheat at Vancouver after the outbreak of the strike had prevented their loading lumber. The strike continued until July 30, 1952.

Meanwhile, on June 27 the charterers exercised their option and declared to the owners their intention to load in the rotation wheat at Vancouver, lumber at Victoria, and thereafter at Coos Bay and Portland, but in view of the position of the strike on that day they cabled the owners proposing a variation in the rotation. That was in the following terms: "*Niki* now dry-docked "Victoria understand ready to load July 1 Vancouver. Present "itinerary 4,050 tons wheat Vancouver 540 lumber Victoria "thence Coos Portland. 540 mille Victoria subject indefinite "delay account Canadian Mill strike therefore we make owners "following proposal. Will commence Coos first loading district "then British Columbia completing Portland. If 540 mille "Victoria still unready due strike will take 4,900 tons wheat "provided owners allow 11,000 dollars for loss revenue and cost "restowing lumber."

The owners took the view that under the terms of the charterparty the vessel was not obliged to wait even a reasonable time at Victoria for the 540 mille lumber intended for shipment and that the charterers' proposal was unacceptable. After a number of communications had passed between the parties the charterers on July 6 cabled the following proposal: "We without pre-"judice propose to submit to arbitration the issue whether "owners allowed count time lost Victoria because of strike as "laytime if vessel loads intended cargo. If owners' contention "correct owners should not compensate charterers for alternative "cargo and cost re-arranging rotation. If owners' contention "wrong owners to pay for expense of bagging 500 tons of grain "and loss of revenue from shipment of grain instead of Victoria "lumber." The owners agreed to submit the issue stated to arbitration and thereupon the alternative rotation was adopted and the alternative cargo of wheat carried.

Whilst the negotiations were proceeding the *Niki* had, in accordance with the charter provisions, proceeded to Vancouver where notice of readiness was given and accepted on July 2. The ship loaded 4,900 tons of wheat at Vancouver between July 2 and 9 on which day she sailed for Coos Bay, where she loaded lumber, sailing thence to Oregon to complete loading. The total time used for loading was 15 days, 13 hours, 50 minutes. The charterers deducted 11,000 dollars from the freight paid, and that sum was placed in escrow in the hands of agents in New York to await the decision of the arbitrator.

The 540 mille lumber which the charterers declared they intended to ship at Victoria was not identified in the sense that it had been separated out and marked for shipment in the *Niki*. It was not customary to separate, mark or identify lumber for loading in any particular vessel until shortly before the lumber was in fact loaded on the vessel, and there would have been no difficulty or delay about the loading of the lumber if the strike had not occurred.

Before the umpire the charterers contended that at the time they made the booking for the 540 mille lumber, no strike was in existence, nor was a strike inevitable, and they did not and could not know the likely duration of any strike that might thereafter occur; that if the lumber had been loaded clause 4 of the charterparty would have protected them from responsibility for any delay in the loading thereof caused by the strike and, accordingly, they were entitled to have the 11,000 dollars released to them.

The owners contended, inter alia, that at the time the charterers contended that they had booked the lumber the strike was inevitable and was likely to be of considerable duration; that they must be deemed at that time to have had knowledge of the inevitability and duration of the strike; that therefore clause 4 would not have protected the charterers from delay in loading caused by the strike if the lumber had in fact been loaded and, accordingly, they were entitled to the 11,000 dollars.

The umpire found, in so far as they were questions of fact, and held, in so far as they were questions of law, that on June 13, 1952, and for some days prior thereto it was probable that the strike would break out shortly after June 14, but that it was not inevitable; that on June 13 no reliable forecast could be made of the likely duration of the strike if it were to break out; that on that date the charterers must be deemed to have had knowledge that the strike was probable but not that it was inevitable and they could not be deemed to have had prior knowledge of its likely duration. If the 540 mille lumber had been loaded, clause 4 would in the circumstances have protected the charterers from responsibility towards the owners for any delay in the loading thereof caused by the strike and the owners would not have been able to count time lost because of the strike as laytime.

Accordingly, he awarded that the charterers were entitled to have released to them the 11,000 dollars, subject to the opinion of the court on the question whether, on the facts agreed and found, they were so entitled. If the question be answered in the affirmative his award should stand. If it be answered in the negative, then in lieu of that award the owners would be entitled to have the 11,000 dollars released to them.

R. A. MacCrindle for the owners. The court should approach this issue with the following principles in mind: Excepted perils in a charterparty which purport to interrupt the running of laytime prima facie operate only if they prevent the loading of the cargo as opposed to matters preliminary thereto. There is an absolute duty to provide a cargo. It is only when the charterer has provided it that the exceptions clause can operate. If a particular charter permits a charterer to load cargo of a variety of types emanating from a variety of sources the charterer cannot be heard to say that laytime did not run during a particular period merely because, owing to an excepted peril, he could not load the particular cargo which he chose to load. The options conferred on him under the cargo clause of the charter are not rights of election but of selection. The mere notification by the charterer of his intention to load one particular cargo out of a range of cargoes does not transform the charterparty into one for the carriage of that particular cargo: *Grant & Co.* v. *Coverdale, Todd & Co.*[1]; *The Rookwood.*[2] [Reference was also made to *Owners of the S.S. Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies.*[3]] The charterer's obligation is to load the cargo stated in the charterparty. When there is a permitted range of cargoes, a charterer who selects one type of cargo and then is prevented from loading it by one of the excepted perils is not protected by the exceptions clause unless he is thereby also prevented from loading the whole range of cargoes. His duty is to load another cargo, although he may be entitled to a reasonable time in which

[1] (1884) 9 App.Cas. 470.
[2] (1894) 10 T.L.R. 314.
[3] (1923) 15 Ll.L.Rep. 81.

to do so. Reliance is placed on *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*,[4] where, under a charterparty providing for the loading of wheat and/or maize and/or rye, there was an exceptions clause providing that "if the cargo cannot be loaded . . . "by reason of . . . a strike . . . or . . . of obstruction . . . beyond "the control of the charterers on the railways . . . the time for "loading shall not count during the continuance of such causes." The charterers, who intended to load wheat, were unable to do so within the prescribed time owing to dilatory working on the particular railway line they had chosen to bring the wheat to the port. By the time the wheat arrived and was loaded the export of wheat had been prohibited. The Court of Appeal held, inter alia, that on the prohibition against the export of wheat coming into force, the charterers came under a duty to load an alternative permitted cargo, although they were allowed a reasonable time to see whether the prohibition would be removed and to make arrangements for loading the substitute cargo. On an appeal by the charterers, the House of Lords affirmed [5] the Court of Appeal's decision. Except for Lord Atkinson,[6] who agreed that the charterers were allowed a reasonable time to switch to an alternative cargo, their Lordships expressed no view on this point, as there was no cross-appeal by the owners on the question of reasonable time. The owners are entitled to rely on the judgments of Scrutton [7] and Atkin L.JJ.[8] and of Lord Atkinson [9]; in particular on the judgment of Scrutton L.J.,[10] the whole tenor of which is that the delay was due to the charterers' failure to switch to another cargo. It is submitted that had their Lordships been faced in that case with the clause at present under consideration they would have come to the same decision. The only real distinction between the two clauses is that in *Bunge's* case [11] the exceptions clause referred to "cargo"; here it is "cargo "intended for shipment." On the authority of *Bunge's* case [11] it is submitted that as the charterers have a mere right of selection, it is their duty to load whichever of the cargoes they wish, but that, if they are unable to do that, they must switch to some other cargo within the permitted range which they are able to load. The question of reasonable time does not arise here because, on the hypothesis the court has been asked to assume, no arrangements were in fact made by the charterers to ship another cargo. The owners also desire to reserve the right to contend that there is an immediate obligation to switch, and there is no allowance of a reasonable time.

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[4] [1924] 2 K.B. 619; 40 T.L.R. 876.

[5] [1925] A.C. 799; 41 T.L.R. 652.

[6] [1925] A.C. 799, 814.

[7] [1924] 2 K.B. 619, 630.

[8] Ibid. 637.

[9] [1925] A.C. 799, 814.

[10] [1924] 2 K.B. 619, 630.

[11] [1924] 2 K.B. 619; [1925] A.C. 799.

As to the construction of clause 4, that must be approached on the basis of the causation of delay, that is to say, the excepted perils must have some relation to the delay. It is not sufficient for the charterers, in order to invoke the clause, to say "There "was a strike." They must show that the delay was commensurate with and caused by the strike. This is a charterer's clause and it must be construed contra proferentem. Any ambiguity should be resolved in the owners' favour. As to the words "cargo "intended for shipment," that expression must postulate that there is a parcel of goods in existence intended for shipment in a particular vessel. There was nothing of that nature here. It is conceded that the owners had been notified that the charterers intended to load 540 mille lumber at Victoria, but no specific lumber was marked out for shipment in this vessel.

Alternatively, the charterers cannot invoke the exceptions clause in circumstances where they deliberately chose to load the lumber and to send the vessel to Victoria knowing that the strike had already been in progress for 11 days. If a charterer, knowing that a strike of indefinite duration is in progress at a particular port, chooses to send a vessel there to load a cargo, any delay in loading is not a consequence of the strike but of his deliberate choice in sending the ship to that port: *Brown* v. *Turner, Brightman & Co.*,[12] *per* Earl Loreburn L.C.[13] and Lord Shaw.[14] The owners are entitled to rely on the principle that a party to a contract containing an exceptions clause is not entitled to rely on it in circumstances where the peril relied on must inevitably have caused delay. The exceptions clause does not apply to an event which one party knows is bound to happen. [Reference was made to *Ciampa* v. *British India Steam Navigation Co. Ltd.*[15] and *Steamship "Induna" Co. Ltd.* v. *British Phosphate Commissioners.*[16]] Here the ship was inevitably doomed to delay as a result of the charterers deliberately exercising their option to select a cargo only available at a port which they knew to be strikebound. A charterer who has a mere right of selection is not entitled to select a course which is already prevented: Carver's Carriage of Goods by Sea, 11th ed., p. 437.

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[12] [1912] A.C. 12.

[13] Ibid. 15.

[14] Ibid. 17.

[15] [1915] 2 K.B. 774.

[16] [1949] 2 K.B. 430; [1949] 1 All E.R. 522.

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Michael Kerr for the charterers. On the hypothesis which the court has been asked to assume, clause 4 of this charter protects the charterers for the time lost while the ship waited at Victoria to load the lumber, and therefore the award is correct. The meaning of clause 4 is quite clear, but before deciding whether it applies to the present case two facts must be ascertained: (1) What is the intended cargo under this charter? (2) Did the strike prevent that intended cargo being loaded? There can be no doubt on the facts found or agreed in the special case (1) that the intended cargo was the 540 mille lumber which the charterers had booked at Victoria, and (2) that the strike of lumbermen prevented it from being loaded. That being so, it is self-evident that the delay in loading the cargo intended for shipment is excused by clause 4 because the clause expressly says so. If the charterers prove that the cargo intended for shipment cannot be loaded because of the strike, they are entitled to keep the ship waiting for the strike to end, subject only to frustration of the charterparty.

As to the construction of clause 4, " delay " referred to in the second sentence must be delay in loading the cargo intended for shipment arising from one of the excepted perils. That construction must be right because it is exactly in accordance with the words. The construction for which the owners contend is unreasonable and tortuous in relation to a commercial document which includes the words " intended for shipment." It involves either deleting the words " intended for shipment " altogether or reading additional words into the clause. The words " intended for shipment " were specifically included in order to contract out of the obligation on the charterers to switch to another cargo and so to contract out of *Brightman & Co.* v. *Bunge y Born Limitada Sociedad.*[17] [Reference was also made to *Owners of the Steamships Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies.*[18]] To construe these words as meaning merely that the charterers are not liable for the delay in switching from the intended cargo to another cargo is neither in accordance with the natural meaning of the words nor good sense, because the charterers already get this protection from *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*[19] in the absence of the word " intended." As to the meaning of " cargo intended for shipment," admittedly it must be cargo which is

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[17] [1924] 2 K.B. 619.

[18] 15 Ll.L.Rep. 81.

[19] [1924] 2 K.B. 619.

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not only intended to be cargo at the time the ship arrives and laytime begins to run, but it must also remain the intended cargo the loading of which is delayed by one of the excepted perils. [Reference was made to *Leonis Steamship Co. Ltd.* v. *Rank Ltd.*[20]] Here there is no doubt that the cargo intended for shipment was the 540 mille lumber which had been nominated to the owners. Nothing more could have been done to make it the intended cargo and it never ceased to be the intended cargo. If it was the charterers' duty to nominate another cargo it was for the owners to obtain a finding to that effect. Here there is no such finding.

If the construction for which the owners contend is correct and clause 4 is within the decision of the Court of Appeal in *Bunge's* case,[21] it is submitted that that case is distinguishable because it concerned a prohibition on the export of wheat so that the shipment of the selected cargo became illegal. The decision can therefore be explained on the principle that if a party to a contract has a choice of a number of ways of performing a contract, and one of them becomes impossible and illegal, he is obliged to perform the contract in another way, but that does not apply where the cause of prevention is purely temporary. A strike is always regarded in law as a purely temporary obstacle, so that where the loading of a particular cargo is prevented by a strike the charterer is not obliged to switch immediately to load another cargo He is entitled to rely on the exceptions clause and to persist in his option for a reasonable time: *Lewis* v. *Louis Dreyfus & Co.*[22] There is no finding here as to what would have been a reasonable time. The question of reasonable time never arose until the issue came before this court.

As to the right of the charterers to order the ship to a strike-bound port, see *Owners of Steamship Matheos* v. *Louis Dreyfus & Co.*[23]; *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel Brothers & Co.*[24]; *Bulman* v. *Fenwick*,[25] and *Dobell* v. *Green*,[26] which are conclusive on the point in favour of the charterers. The position in law is that the charterers had the option, whether it be election or selection, to order this vessel to load lumber at Victoria on June 27, and there is no principle which prevented them from exercising that option. Once the ship arrived they were entitled to order it to wait there to load the intended cargo and to rely on the exceptions clause to excuse them from any delay. They were under no obligation to make arrangements to load another cargo. The strike might have ended at any time. Even if the court takes the view, contrary to that submission, that on the basis of *Bunge's* case [27] the charterers were under an obligation to load an alternative cargo, that could not affect their right to order the vessel to Victoria and, when she arrived, if the strike still continued, to persist in their selection of lumber as the intended cargo for a reasonable time thereafter. It was only when the delay became unreasonable that they came under an obligation to switch to another cargo. The onus was on the owners to obtain a finding that it would have been unreasonable for the charterers to do nothing. In the absence of such a finding there was no obligation on them to switch to another cargo: *Owners of Steamship Matheos* v. *Louis Dreyfus & Co.*[28] For the reasons given the award should be upheld.

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[20] [1908] 1 K.B. 499; 24 T.L.R. 128.

[21] [1924] 2 K.B. 619.

[22] (1926) 31 Com.Cas. 239.

[23] [1925] A.C. 654; 41 T.L.R. 393.

[24] [1891] 2 Q.B. 647; 7 T.L.R. 704.

[25] [1894] 1 Q.B. 179; 10 T.L.R. 45.

[26] [1900] 1 Q.B. 526; 16 T.L.R. 204.

MacCrindle in reply. This is not a case like *Owners of Steamship Matheos* v. *Louis Dreyfus & Co.*[28] and the charterers were not entitled to remain with folded arms until the strike ended and make no effort to obtain an alternative cargo: Scrutton on Charterparties, 11th ed., pp. 364–367.

If the court takes the view that the charterers were entitled to a reasonable time to switch to another cargo, there is material on which it can be inferred that a reasonable time had elapsed by the time the ship arrived at Victoria, and it would be unnecessary to remit the case for a further finding. In the light of the charterers' knowledge that the strike had broken out, there is no justification for saying that reasonable time only started when the ship arrived at Victoria. It started when the charterers first heard of the strike. By the time the ship arrived at Victoria they could have made preliminary arrangements for loading an alternative cargo and the time lost in so doing would have been minimal. As to the right of a charterer to send a ship to a strike-bound port, *Dobell* v. *Green* [29] and *Bulman* v. *Fenwick* [30] are against the owners' submission, but it is submitted that, even if the charterers are entitled to do so, they cannot rely on the exceptions clause to prevent laytime from running if the strike continues. The alternative award should be upheld.

[27] [1924] 2 K.B. 619.

[28] [1925] A.C. 654.

[29] [1900] 1 Q.B. 526.

[30] [1894] 1 Q.B. 179.

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Diplock J. This is a case stated by an umpire arising out of the lumber strike in British Columbia in 1952. It raises a neat point of construction as to an exceptions clause in a charterparty. [His Lordship read the relevant clauses of the charterparty, stated the facts and continued:] The question which party is entitled to the 11,000 dollars depends in the first instance on the true construction of the exceptions clause in the charterparty. The first sentence contains the ordinary provision for excepted perils, and the clause then provides: " . . . Charterers shall not be "responsible for any delay if the cargo intended for shipment "under this charterparty cannot be provided, delivered, loaded "or discharged by reason of riots, strikes or lockouts of any "class of workmen or stoppage of labour connected in any way "with, or essential to the providing, delivery, loading or dis"charging of the cargo, or by reason of floods, fire, ice, frosts, "fogs, bad weather, and all accidents or hindrances or other "cause or causes beyond the control of shippers or receivers "which may prevent or delay the providing, delivery, loading "or discharging of the cargo, including all accidents to piers, "mines, mills, factories or machinery, railway and canal stop"pages and hindrances, political disturbances, insurrections or "interventions of constituted authorities." It seems to me that I have to construe that exceptions clause in the light of four propositions of law. The first is that prima facie it is the duty of the charterer to have the cargo ready to start loading at the commencement of the laydays: secondly, in an exceptions clause providing for interruption of laydays for excepted perils, prima facie this relates to excepted perils which affect the actual operations of loading, not perils which affect merely the provision of the cargo or its transport to the loading place; thirdly, where a charterparty permits the loading of a selection of different cargoes, the fact that the exceptions clause would excuse delay in loading one type of cargo does not excuse a failure to load an alternative type of cargo, the loading of which is not affected by an excepted peril; fourthly, in such a case, the exceptions clause does excuse delay in loading for such time as is reasonably required for the charterers to make arrangements to obtain and make ready for loading an alternative type of cargo.

It is unnecessary for me to refer to any authorities for those propositions of law other than *Bunge y Born Limitada Sociedad* v. *Brightman & Co.*[1] The decision in the House of Lords[2] is authority for propositions 2 and 3; the decision in the Court of Appeal[3] is authority for proposition 4; although in the House of Lords Lord Dunedin indicated[4] that he was not satisfied that that part of the decision of the Court of Appeal which is the authority for proposition 4 might not require examination at some time by their Lordships' House. It is, however, binding upon me, and, with respect, I also think that it is right. Those are the relevant propositions of law which should form the background of the construction of the exceptions clause, which, like so many clauses in charterparties, succeeds at the same time in being elliptical, tautologous and ungrammatical. First, as regards the ellipsis, " . . . Charterers shall not be responsible for any " delay if the cargo intended for shipment under this charterparty " cannot be provided . . . by reason of . . . strikes. . . ." It seems to me that this must be construed as " the charterers shall " not be responsible for any delay in performing their duties as " respects providing a cargo ready for loading," because it is the charterers' responsibility which is referred to, and the charterers' responsibility in relation to loading. " The charterers shall not " be responsible for any delay in performance of their duties in " providing a cargo ready for loading, if the cargo intended " for shipment cannot be provided by reason of strikes." It seems to me that, as Mr. MacCrindle has pointed out, this relates to causation of delay, and that the words must mean " so far as delay is caused, or to the extent that the delay is " caused by "—the excepted perils or circumstances which follow. The relevant excepted circumstance here is " cargo intended for " shipment cannot be provided for loading by reason of strikes."

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[1] [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876.

[2] [1925] A.C. 799.

What is the delay in the performance of the duties of the charterers resulting from the inability to load the intended cargo? That question involves considering what their duties are as regards the provision of cargo. Under this charterparty, they were under a duty to provide any number of alternative cargoes. If, therefore, the particular cargo in this case, timber, could not be provided, the charterers were under a duty to provide another. Their inability to provide the intended cargo may result, and would result, in their acquiring a reasonable time to make alternative arrangements to provide another cargo, but it seems to me that that, and that only, is the extent of the delay caused by a strike affecting only one of the alternative cargoes which the charterer is entitled, and indeed under a duty, to supply. In this case the strike affected only timber or lumber. It did not affect wheat or any other of the cargoes concerned.

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[3] [1924] 2 K.B. 619; sub nom. *Brightman & Co.* v. *Bunge y Born Limitada Sociedad.*

[4] [1925] A.C. 799, 808.

Mr. Kerr has contended, as was originally contended by the charterers, that I should read the exceptions clause as entitling the charterers to wait with their arms folded until the strike ended and make no effort to obtain an alternative cargo. He suggested that the purpose of using the words "if the cargo "intended for shipment under this charterparty cannot be pro-"vided," as opposed to the words "if the cargo cannot be "provided," was for the purpose of overruling or getting rid of the effect of the decision in *Bunge y Born Limitada Socicdad* v. *Brightman & Co.*[5] He says that no other purpose can account for the use of the clause in its present form. It seems to me that the reason for the clause in its present form can easily be accounted for as being intended to overcome the general rule that excepted perils affecting the provision or transport of the cargo as opposed to loading do not come within the ordinary clause. It is to be observed that the words used are: "the cargo "intended for shipment under this charterparty cannot be pro-"vided, delivered, loaded or discharged by reason of"—the various perils, so that the clause was necessary to overcome what I referred to as the second proposition of law relevant to the present case. It was also necessary to define the extent to which interference with provision for loading should be brought within the clause, and to define it very sensibly by limiting it to the cargo which it was the intention of the charterer to load. In other words, it was to give him a reasonable time to make provision for other arrangements, when the arrangements he had already made fell through because of the excepted perils.

I think, therefore, that on the true construction of the exceptions clause, if this vessel had gone to Victoria—as the charterers were entitled to send it—they would not have been entitled, as they claimed, to sit with folded arms and hold it there until the strike ended on July 30. It would have been their duty to make alternative arrangements. It would have been their duty to make preliminary arrangements before they sent the vessel to Victoria, if there was a reasonable likelihood of the strike continuing when the vessel arrived, and to make definite arrangements as soon as it was clear that it would continue. They were entitled to a reasonable time to make those arrangements but to nothing more.

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[5] [1925] A.C. 799.

That being my view as to the construction of the charterparty, a question I find more difficult is the proper construction of the agreement to arbitrate, because the matter which depends upon it is the destination of the 11,000 dollars. It is apparent, when one looks at the documents which passed between the parties, and the special case, that the contentions of the parties until the lawyers were allowed within 100 miles of it, were, on the one hand, that the charterers said: "We are entitled to "wait all the time," and the owners said: "You are not entitled "to wait at all." It did not occur to anyone that there might be a half-way house, or a quarter or a tenth-way house (which I think is the more likely figure at which to put it).

A telegram of July 6, 1952, sets out the issue which it was proposed to submit to arbitration. The parties had made their contentions in previous telegrams, the original proposal being that the charterers should make the variation in their rotation and the cargoes, and deduct 11,000 dollars from the freight for loss of revenue and the cost of re-stowing the lumber. In subsequent telegrams the two parties set out their contentions. On July 6 the most important telegram came from the charterers to the owners. It reads as follows: "We without prejudice "propose to submit to arbitration the issue whether owners "allowed count time lost Victoria because of strike as laytime if "vessel loads intended cargo. If owners' contention correct "owners should not compensate charterers for alternative cargo "and cost rearranging rotation if owners' contention wrong "owners to pay for expense of bagging." Subsequent arrangements were that, instead of there being payment of the exact sum of the cost of bagging, the 11,000 dollars, which is at present in escrow, should be released to the charterers if the issue was decided in their favour, and if otherwise should be released to the owners.

The issue therefore is this: "Whether owners allowed count "time lost Victoria because of strike as laytime if vessel loads "intended cargo." That seems to me to involve the arbitrators, the umpire and myself in deciding a hypothetical question, because it did not in fact happen. The hypothesis which we have to assume is that the vessel went to Victoria, stayed there until the end of the strike, and then loaded the intended cargo, the timber, and on that hypothesis to answer the question whether the owners would have been allowed to count the time during which the strike continued as laytime. On the true construction of the clause, it may well be that, had the vessel in fact gone to Victoria, the charterers might have been able to make out a case for counting some short period to enable them to obtain an alternative cargo, or possibly a reasonable time for them to consider the possibilities or probabilities of the strike ending more quickly than the time in which an alternative cargo could be obtained. I am clear, however, that, in order to take advantage of the exceptions clause in the only way that it is possible that they could have taken advantage of it, it would be necessary for them to show that they had made attempts to obtain an alternative cargo, or, alternatively, that they had considered the matter, or applied their minds to the question whether the strike would end before that could be done. They could not have brought themselves within the exceptions clause without being in a position to show that they had taken that course of action. I think the question as put, namely, "if vessel loads intended cargo," does require me to assume that the charterers took their stand upon the contention which they had put forward, that they were entitled to do nothing but wait for the strike to end, and that accordingly, in answering this question, I am to assume that the charterers could not bring themselves within the exceptions clause in the way which I have indicated as the only way in which they could do it.

I think the question is a difficult one. I feel a little uneasy about the proper construction of this document. On the whole I think the answer to the question as put is that the owners' contention is right, and that, accordingly, the sum of 11,000 dollars ought to be released to them. [His Lordship was then invited by counsel to deal with the submission that a charterer was not entitled to send a vessel to a strike-bound port, and secondly, with the submission that the lumber was not an "intended" cargo because it was not identified.]

It was contended by Mr. MacCrindle, although I did not, in the view I took of the construction of the charterparty, have to deal with it, that the charterers were not entitled to send the vessel to a strike-bound port when they knew that there was a strike in progress. I do not think that is a good contention. A strike being something which may end at any time, a charterer is entitled to continue to exercise his right under the charterparty to send the vessel to a strike-bound port in the hope and expectation that the strike will be over when he gets there, and I do not think he brings himself out of the exceptions clause by doing so.

The owners' safeguard in such a case, in the view which I have taken of this exceptions clause, is that, having sent the vessel to a strike-bound port, it is the charterer's duty to obtain an alternative cargo within a reasonable time if, when the ship gets there, the strike-bound cargo is not available. I apprehend that, in considering what is a reasonable time in which to obtain an alternative cargo, one must take into consideration that, in sending the vessel to a strike-bound port, knowing that the strike was on, it would be reasonable of him to make in advance preliminary arrangements for obtaining a cargo if the strike does continue when he gets there. This will thus be no great encouragement for charterers to send vessels to strike-bound ports.

The other matter with which I did not deal, because I have decided the case in Mr. MacCrindle's favour on other grounds, was his contention that the 540 mille of lumber was not an "intended cargo," because it was not identified in the sense that it had been separated out and marked for shipment in the *Niki*, that is to say, it was not identified in any way. In the agreed facts it is stated: "It is not customary to separate, mark "or identify lumber for loading in any particular vessel until "shortly before the lumber is in fact loaded on the vessel, and "there would have been no difficulty or delay about the loading "of the 540 mille lumber if the said strike had not occurred." Mr. MacCrindle, as I understood his argument, contended that the lumber could not be an "intended cargo" until it was identified in some way or other and separated out as being a cargo of particular timber destined for the *Niki*. That consideration seems to me to be appropriate when considering the question of passing the property in the sale of goods. But I think a commercial man who read a charterparty containing a reference to "intended cargo," although he might not think the exceptions clause means what I have now found it to mean, would at least feel that "intended cargo" covered the cargo in this case which had been booked.

The result is that the question of law posed to the court in the special case will be answered in the negative and the alternative award will be upheld.

Appeal allowed.

Solicitors: *Stokes & Mitcalfe; Botterell & Roche.*

E. M. W.

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Oct. 21, 22; *Nov.* 21.

Lord Parker C.J., Streatfeild and Diplock JJ.

DIRECTOR OF PUBLIC PROSECUTIONS *v.* NIESER.

Criminal Law—Receiving—Misdemeanour—Property obtained in circumstances amounting to misdemeanour—Whether proof of knowledge of specific misdemeanour necessary — Recent possession — Inference of knowledge—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 33 (1).

Where property has been obtained under circumstances which amount to misdemeanour it is still sufficient under section 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to misdemeanour; and it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand, it is not merely sufficient to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony.

The defendant was charged on two informations that he received a refrigerator and a television set knowing them to have been obtained under circumstances amounting to a misdemeanour, namely, in the first case, false pretences, contrary to section 33 of the Larceny Act, 1916, and, in the case of the television set, in incurring a debt or liability, obtaining credit under false pretences or by means of other fraud, contrary to section 33. Evidence was given by H., who had obtained the goods in circumstances amounting to those respective misdemeanours, that she sold them to the defendant at considerably below their true value. The only other evidence for the prosecution was that of a police officer who had found the goods at the defendant's premises. He also produced a signed statement by the defendant in which he denied having bought anything from the first witness except the television set. The justices, being of opinion that there was no evidence that the defendant knew of the specific misdemeanour by which the goods had been obtained, dismissed the informations:—

Held, (1) that, although it was not sufficient to show that the defendant knew that the goods were obtained by some dishonest means and the prosecution must show that he knew that they were obtained in circumstances which amounted to misdemeanour as opposed to felony, it was not necessary for the prosecution to show that the defendant knew the precise nature of the misdemeanour by which the property was obtained.

But (2) that where property had been obtained under circumstances amounting to misdemeanour, the inference could not be drawn from its being found in the defendant's possession that he knew that it had been obtained in this way as opposed to having been stolen; and, although there was evidence that the defendant

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knew that the goods had been obtained by dishonest means sufficient to support a charge of receiving goods knowing them to have been stolen, that was not sufficient to show that he knew that they had been obtained in circumstances amounting to a misdemeanour and, there being no evidence of such knowledge by the defendant, he was accordingly entitled to be acquitted.

Observations on "doctrine of recent possession."

CASE STATED by Edmonton justices sitting at Tottenham.

On May 2, 1958, the defendant, Brian Douglas Nieser, a second-hand dealer, was charged on two informations which alleged that he (1) "On a day unknown between June 12, 1956, "and June 30, 1956, at Tottenham, received a 'Morphy "'Richards' refrigerator to the value of £54 knowing it to have "been obtained under circumstances amounting to a misdemeanour, that is, by false pretences, contrary to section 33 "of the Larceny Act, 1916,[1]" and (2) "On a day unknown "between August 18, 1956, and August 31, 1956, received a "'Sobell' television set to the value of £71 10s. knowing it to "have been obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, that "is, in incurring a debt or liability, obtaining credit under false "pretences or by means of other fraud, contrary to section 33 "of the Larceny Act, 1916." The defendant elected to be tried summarily and pleaded Not Guilty.

According to the case the following was a summary of the evidence called for the prosecution.

Evidence was given by a Mrs. Honey that she had pleaded Guilty to obtaining the "Morphy Richards" refrigerator by false pretences and she produced the credit sale agreement dated June 12, 1956, under which she obtained it. She said that she had written "Edward Smith" on the agreement as the name of the purchaser; that she had paid a deposit of £4; and that the value of the refrigerator was £58 10s. She said that before she got the refrigerator she went to see the defendant in a shop which he ran, told him that she was getting a "Morphy Richards" refrigerator and asked him if he would like to buy it. The defendant had said that he would like to buy it and she had then gone and obtained it. The refrigerator was delivered to her house, where it was never installed but remained standing in the hall. She told the defendant when it arrived and that same day he collected it late at night, about six hours after it had been delivered to her. The price the defendant was to pay for the refrigerator was not agreed until after the refrigerator was delivered to Mrs. Honey. She then asked £30 for it, but the defendant did not agree to that and paid her £25. With regard to the second information, Mrs. Honey said that she had obtained a "Sobell" television set on credit sale terms and produced the agreement dated August 18, 1956, relating to the set. The agreement showed the credit sale price was £90 6s. She said that she ordered the set, but that the agreement was put in the name of her son, Edward Honey, who signed the agreement; and that she had also signed it "E. Honey" as guarantor. She said that when the set was delivered to her she sold it almost immediately to the defendant; that it was not used in her house and that no aerial was put up; that she told the defendant when it arrived and that he came at night-time and took it away. She asked the defendant for £40 for the set, but he would not give her more than £35, which she accepted.

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[1] Larceny Act, 1916, s. 33 (as amended by the Criminal Justice Act, 1948, s. 1 (1)): "(1) Every person "who receives any property knowing "the same to have been stolen or "obtained in any way whatsoever "under circumstances which amount "to felony or misdemeanour, shall be "guilty of an offence of the like degree "(whether felony or misdemeanour) "and on conviction thereof liable—(*a*) "in the case of felony, to imprisonment for a term not exceeding "fourteen years; (*b*) in the case of "misdemeanour, to imprisonment for "a term not exceeding seven years; ". . . (4) Every person who, without "lawful excuse, knowing the same to "have been stolen or obtained in any "way whatsoever under such circumstances that if the act had been "committed in the United Kingdom "the person committing it would have "been guilty of felony or misdemeanour, receives or has in his possession "any property so stolen or obtained "outside the United Kingdom, shall "be guilty of an offence . . ."

The only other evidence given for the prosecution was that of a police officer who said that he saw the defendant on September 11, 1956, at the defendant's premises. He told the defendant that he was making inquiries about a "Sobell" television set sold to the defendant by Mrs. Honey. At first the defendant was very hostile and said: "I don't know what you're talking about." He then made a statement, which he signed. The effect of this statement was that he was a second-hand dealer; that he knew Mrs. Honey, though not by name; that she came to his shop and asked if he was interested in buying a television set; that he went round to her house to look at the set; and agreed to buy it; that he gave her £40 for it and took the set home; that he had never bought anything else from Mrs. Honey. He identified the set as the one in his sitting room. The police officer called again at the defendant's house on September 13, 1957, when he saw a "Morphy Richards" refrigerator on the landing upstairs. He found that it bore the same serial number as was shown on the credit sale agreement produced by Mrs. Honey. He then saw the defendant, cautioned him and told him that he had seen the refrigerator which bore the same serial number as was shown on the credit sale agreement, and that the refrigerator had been sold on credit sale terms to E. Honey on June 12, 1956. He showed the agreement to the defendant and asked him why he had previously denied that he had bought anything else from Mrs. Honey. The defendant replied: "I don't know where I got it from. I "never got it from her; I don't know where it came from." The officer asked him if he had given or obtained a receipt for it. The defendant replied: "I don't bother about things like that." The defendant's mother, in his presence, then said that her previous husband had bought it in 1955, whereupon the officer pointed out that that could not be possible as the refrigerator had not been issued to the public until June 12, 1956. The defendant then said: "All right, you know so much get on with it, I'm "not saying any more." The officer arrested the defendant on April 24, 1958, read the warrant to him and cautioned him. The defendant made no reply then or later when formally charged.

At the end of the prosecution's case, the defendant's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only and was abandoned on appeal. The second ground was that, as regards the refrigerator, where the misdemeanour alleged was false pretences, there was no evidence as to any false pretence having operated on the mind of the defendant; that the only evidence was that Mrs. Honey had pleaded Guilty to obtaining it by false pretences: the vital false pretence question had not been asked. It was submitted that the prosecution had to show that the defendant knew, in respect of the charge relating to the refrigerator, that it had been obtained by false pretences in accordance with the particulars of that charge; and that the defendant knew, in respect of the charge relating to the television set, that it had been obtained by incurring a debt or liability, or obtaining credit by false pretences or by means of other fraud, contrary to section 33 of the Larceny Act, 1916, and that in these cases the prosecution had not produced any evidence to show that this was the case.

It was contended on behalf of the prosecution that the prosecution were not required to prove that the defendant had knowledge of exactly what misdemeanour Mrs. Honey had committed. It was pointed out that in a case of receiving stolen goods, the prosecution might call the thief to say that he sold the stolen goods to the receiver; but that the thief did not normally state in evidence that he told the receiver that he had stolen them: the guilty knowledge in such a case was presumed from other circumstances, such as the price at which the receiver bought the goods, or his denial that he had them. The prosecution contended that, following that analogy, where the charge related to the second limb of section 33 of the Larceny Act, 1916, i.e., receiving goods that were not stolen, but were "obtained in "any way whatsoever under circumstances which amount to "felony or misdemeanour," the circumstances amounting to a misdemeanour could be proved by the principal offender (Mrs. Honey in this case); and the defendant's guilty knowledge could be proved by: (*a*) the fact that he, a second-hand dealer, paid only about half price for goods which were clearly in new condition, as they had not been installed in Mrs. Honey's house; (*b*) the fact that he knew that Mrs. Honey was going to get the refrigerator and bought it from her at a low price as soon as she got it; (*c*) the fact that, so far as the refrigerator was concerned, he denied that he had bought anything other than the television set from Mrs. Honey; (*d*) the fact that he bought the television set from her after he knew the circumstances in which the refrigerator was obtained; (*e*) the fact that he, a dealer in second-hand furniture, said that he did not bother about receipts when he bought the refrigerator and did not know where he had got it; (*f*) the fact that both articles were used in the private part of the house, and formed no part of the effects of the business of the shop.

The prosecution contended that it was not necessary that Mrs. Honey should be proved to have said to the defendant: "I got "the refrigerator by false pretences and I got the television in "the course of getting credit by fraud"; but that there was evidence that those misdemeanours had been committed and that the defendant's guilty knowledge of the circumstances in which the goods were obtained was proved by items (*a*) to (*f*) above.

The justices were of opinion that Mrs. Honey had obtained the refrigerator and the television set in circumstances which amounted to the misdemeanour alleged in the informations and that the defendant had bought them from her. They were further of opinion that from the evidence as to the prices paid by the defendant, his statement that he did not bother about receipts, his signed statement that he had bought nothing other than the television set from Mrs. Honey and his other statements and conduct on September 13, 1957, when seen by the police, there was some evidence that he knew, at the time that he received them, that the goods had been obtained by some dishonest means. They were, however, of opinion that there was no evidence that the defendant knew (*a*) that it was by false pretences that Mrs. Honey had obtained the refrigerator, and (*b*) that it was while getting credit by fraud that Mrs. Honey had obtained the television set. They accordingly found that there was no case to answer on either information, dismissed both informations and discharged the defendant.

The prosecutor appealed.

J. H. Buzzard for the prosecutor. The justices were wrong in law in holding that there was no case to answer on either information. The prosecutor had to show that there was some evidence that the defendant knew that the goods had been obtained under circumstances amounting to a misdemeanour. It is conceded that an erroneous belief on the part of the defendant that the goods had been stolen would be a good defence to the informations, because section 33 (1) of the Larceny Act, 1916, created one, possibly two, felonies where the goods received had been, and were known to the receiver to have been, stolen or obtained in circumstances amounting to felony, and one misdemeanour where the goods had been obtained, and had been known by the receiver to have been obtained, in circumstances amounting to misdemeanour. This was evident from the fact that in 1916 there were important differences between the procedure on the trial of felonies and misdemeanours, quite apart from the difference in penalty.

The following evidence is relied on to show that the defendant knew that the goods in both the informations had been obtained under circumstances amounting to misdemeanour: (1) In both cases the defendant received the goods directly from the person who had obtained them in circumstances amounting to a misdemeanour, very shortly after they had been so obtained. Although there appeared to be no authority on the point, as a matter of common sense the only probative value of evidence of "recent "possession" was that receipt by the defendant of goods dishonestly obtained shortly after they had been so obtained entitled a jury, in the absence of evidence to the contrary, to draw the inference that he knew how they had, in fact, been obtained. If this view is correct, the doctrine of recent possession is equally applicable to the misdemeanour created by section 33 (1) as to the felony of receiving goods knowing them to have been stolen. (2) Quite apart from this, there was evidence to indicate that the defendant knew that the goods had been obtained under circumstances amounting to misdemeanour rather than felony. It was notorious that in recent years numbers of articles such as television sets and refrigerators had been fraudulently obtained under credit sale agreements. The evidence that the defendant had fetched, on two different occasions, one refrigerator and one television set in the evening from Mrs. Honey's house by itself would indicate a belief on the defendant's part that the goods had been obtained, not by theft of the nature of shop-breaking, but either by hire purchase, in which case they would have been stolen, or by credit sale agreement, in which case they would have been obtained under circumstances amounting to misdemeanour. On the dates on which the defendant received both articles the minimum deposit required for a hire purchase agreement with respect to that class of goods was 50 per cent. Accepting the justices' finding that there was some evidence that the defendant knew at the time that he received them that the goods had been obtained by some dishonest means, it would be ridiculous to suggest that when he paid less than half the value for the goods he thought that they had been obtained under hire purchase agreements, because, if so, Mrs. Honey would have had to pay more by way of deposit than she received from the defendant and would be carrying on this fraud at a loss. On the other hand, the deposit on a credit sale agreement amounted to only one-ninth of the total value, so that there was a strong inference that the defendant believed that they had been obtained dishonestly under a credit sale agreement.

W. M. F. Hudson for the defendant. The justices were right in holding that there was no case to answer. There was no evidence to show that the defendant knew at the time of receiving the goods that they had been received under circumstances amounting to the particular misdemeanours referred to in the informations. It may be that the defendant knew that the goods had been obtained dishonestly, but that is not sufficient for a conviction under section 33 (1) of the Larceny Act, 1916.

Cur. adv. vult.

November 21. LORD PARKER C.J. Diplock J. will deliver the judgment of the court.

DIPLOCK J. read the following judgment: This court reserved judgment, because, in the course of argument, there emerged an important question of principle as to the essential ingredients of the offence or offences created by section 33 (1) of the Larceny Act, 1916, which does not appear so far to have been judicially decided, and which is particularly important in an age when transactions by way of credit sale agreements are becoming increasingly common. [His Lordship stated the facts and continued:]

At the end of the prosecution's case the defendant's counsel submitted that there was no case to answer. The submission was on two grounds, one of which applied to the second information only, and was abandoned in this court. It is sufficient to say that it was based on a misunderstanding of the decision in *Rex* v. *Schweller*,[1] which found some support in a passage in former editions of Archbold which has been deleted in the most recent edition.

The second ground of submission applied to both informations and was based upon the contention that to sustain a charge of receiving property knowing it to have been obtained under circumstances amounting to a misdemeanour which is specified in the charge it is necessary for the prosecution to prove that the accused knew that the property had been obtained by the misdemeanour so specified and not in some other, albeit criminally, dishonest way.

It was contended by counsel for the Crown that just as in a charge of receiving stolen goods knowing them to have been stolen it is unnecessary for the prosecution to prove that the accused knew of the details or even the particular form of the stealing, but that it is sufficient to prove that the accused knew that the property had been stolen generally, so, by analogy, in a charge of receiving property knowing that it has been obtained under circumstances amounting to a misdemeanour, it is unnecessary for the prosecution to prove more than that the accused knew of the circumstances amounting to a misdemeanour generally, without showing that he knew of the particular misdemeanour. He conceded that in a charge of receiving property knowing it to have been obtained under circumstances amounting to misdemeanour it would be insufficient, and indeed would be an effective defence, if it were shown that the accused believed, although erroneously, that the goods had been stolen; but he contended that under the doctrine of "recent possession," which, on the evidence, was applicable to this case, the justices were entitled to infer that the accused knew the true facts as to the circumstances in which the goods were unlawfully obtained by Mrs. Honey.

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[1] (1924) 18 Cr.App.R. 52.

The justices accepted the defendant's submission as correctly stating the law. They said in paragraph 6 of the case: " We were " of opinion that Mrs. Honey had obtained the refrigerator and the " television set in circumstances which amounted to the misde- " meanours alleged in the informations and that the [defendant] " had bought them from her. We were further of opinion that " from the evidence as to the prices paid by the [defendant], his " statement that he did not bother about receipts, his signed state- " ment that he had bought nothing other than the television set " from Mrs. Honey and his other statements and conduct on Sep- " tember 13, 1957, when seen by the police, there was some " evidence that he knew, at the time that he received them, that " the goods had been obtained by some dishonest means. We " were, however, of opinion that there was no evidence that the " [defendant] knew (*a*) that it was by false pretences that Mrs. " Honey had obtained the refrigerator, and (*b*) that it was while " getting credit by fraud that Mrs. Honey had obtained the tele- " vision set. 7. We accordingly found that there was no case to " answer on either information. We therefore dismissed both " informations and discharged the [defendant]."

The question of law put for the consideration of this court is whether the justices were correct in holding that there was no case to answer on either information. This involves two questions: (*a*) What knowledge of the circumstances under which property was criminally obtained by a third person must be shown to have been possessed by the accused in order that an offence of receiving property obtained under circumstances which amount to misdemeanour, contrary to section 33 (1) of the Larceny Act, 1916, may be made out? (*b*) Was there any evidence in this case which would have entitled a jury to find that he in fact possessed that knowledge? The answer to the first question depends upon the true construction of section 33 (1) of the Larceny Act, 1916. [His Lordship read the subsection and continued:] This phraseology contains two ellipses. The nature of the first of these is apparent in comparing the language of subsection (1) with that of subsection (4) of the same section, which deals with very similar offences. Subsection (1) speaks of " any property." It is only the presence of the word " knowing " followed by a statement of the facts known which connotes that these facts are true and thus by implication qualifies the generality of the expression "any property" by limiting it to "property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour."

The first part of the subsection expanded to fill these ellipses would thus read: "Every person who receives any property "(which has been stolen or obtained in any way whatsoever "under circumstances which amount to felony or misdemeanour) "knowing the same to have been stolen or obtained in any way "whatsoever under circumstances which amount to felony or "misdemeanour shall be guilty of an offence . . ." Pausing at this point, it is relevant to observe that the phrase "under "circumstances which amount to felony or misdemeanour" must qualify the participle "stolen" as well as "obtained," for some stealing is neither felony nor misdemeanour but a summary offence only. Receiving goods stolen under circumstances which amount to a summary offence is excluded from the subsection; it is dealt with separately by the unrepealed section 97 of the Larceny Act, 1861. This construction of subsection (1) is reinforced by comparing its wording with the less elliptical wording of subsection (4), which refers to "property so stolen or "obtained" and not to "property stolen or so obtained."

The second ellipsis is to be found in the words "guilty of an "offence of the like degree (whether felony or misdemeanour)." The offence to which that committed by the receiver is to be "of "the like degree (whether felony or misdemeanour)" is an offence other than that of which the receiver is himself guilty and must be the only other offence alluded to in the subsection. It is tempting, having filled the first ellipsis, to say that this offence is the actual offence committed by the person by whom the property was in fact stolen or obtained, irrespective of whether its degree was known to the receiver; but this we think would be fallacious, since the only express allusion to another offence contained in the subsection is to the offence "known" by the receiver to have been committed.

Subsection (1), expanded to fill the two ellipses, thus reads: "Every person who receives any property (which has been stolen "or obtained in any way whatsoever under circumstances which "amount to felony or misdemeanour) knowing the same to have "been stolen or obtained in any way whatsoever under circum"stances which amount to felony or misdemeanour shall be "guilty of an offence of the like degree (whether felony or mis"demeanour) (as the degree of offence known by such person "to have been committed by the person by whom such property "was stolen or obtained) and on conviction thereof liable (*a*) in "the case of felony to imprisonment for any term not exceeding "fourteen years; (*b*) in the case of misdemeanour to imprisonment "for any term not exceeding seven years."

The subsection thus creates two classes of offence, one a felony, the other a misdemeanour, according to the circumstances in which the property received was stolen or obtained. It treats property as falling into two classes: (1) property which has been stolen or obtained in any way whatsoever under circumstances which amount to felony and (2) property which has been stolen or obtained in any way whatsoever under circumstances amounting to misdemeanour; and it requires, as an ingredient of the offence, knowledge by the receiver of at least the category into which the property he has received falls.

Does it require more specific knowledge by the receiver than this of the nature of the offence committed by the person by whom the property was stolen or obtained? Neither the structure of the subsection itself nor its antecedent legal history compels us to such a conclusion.

At common law the offence of receiving was a misdemeanour and was limited to cases of property which was stolen. There is ample authority that in cases of stolen goods, which are by far the most frequent subject of receiving charges, it is unnecessary to prove detailed knowledge by the receiver of the circumstances of the original taking, and this was so, not only at common law, but also under the Larceny Act, 1861, and is still so under the present subsection. The Larceny Act, 1861, created by section 91 the offence of felonious receiving, limiting it to cases of property which had been and was known by the receiver to have been obtained (whether by stealing or not) under circumstances which amounted to felony at common law or under that Act. By a separate section, section 95, a new misdemeanour was created of receiving property which had been and was known by the receiver to have been obtained (whether by stealing or not) under circumstances which amounted to misdemeanour under the Act of 1861. Under the law as it stood between 1861 and 1916 there were thus two separate statutory offences chargeable under different sections of the Act of 1861 and a common law misdemeanour of receiving stolen property, the stealing of which was not a felony either at common law or under the Act of 1861. It is, we think, plain from the wording of sections 91 and 95 of the Act of 1861, first, that to constitute the offence of felonious receiving it was necessary to show that the receiver knew that the property received had been feloniously obtained and that to constitute the statutory misdemeanour of receiving the receiver knew that the property had been obtained under circumstances amounting to a misdemeanour, and secondly, that it was sufficient in either case to show that he knew that the property came within the general category of property with which the respective sections dealt; it was not necessary to show that he knew by what specific felony or by what specific misdemeanour the property had been obtained. We think that subsection (1) of section 33 of the Larceny Act, 1916, did no more than to re-enact in a single section provisions corresponding to those of sections 91 and 95 of the Larceny Act, 1861.

We are therefore of opinion that where property has been obtained under circumstances which amount to misdemeanour it is still sufficient under section 33 (1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to misdemeanour; and that it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand, it is not merely sufficient to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell which we feel compelled to hold is an essential ingredient of the offence charged.

Similarly, where property has been stolen or obtained under circumstances which amount to felony, it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific felony by which it was in fact obtained. But, although this is sufficient to establish an offence of felonious receiving under section 33 (1) of the Larceny Act, 1916, more specific knowledge is required where property has in fact been stolen and it is desired, for the purpose of proving guilt, to adduce evidence of guilty knowledge of the receiver of the kind referred to in section 43 (1) of the Act. This evidence (that is, of other stolen property having previously been found in his possession and of previous convictions for dishonesty) is admissible only in the cases where property has been stolen and the receiver knows that it has been stolen. To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way, even under circumstances which amount to felony.

It follows that in the present case the justices were right in holding as a matter of law that it was not sufficient to show that the accused knew that the goods were obtained by some dishonest means. The prosecution must go further and adduce evidence to show that he knew that they were obtained in circumstances which do in law amount to misdemeanour as opposed to felony. The justices were wrong, however, in supposing that it was necessary for the prosecution to adduce evidence to show that the accused knew the precise nature of the misdemeanour by which the property was in fact obtained.

This brings us to the second question, whether in the present case there was any evidence to show that the accused in fact possessed the requisite degree of knowledge, and in this connection to the Crown's contention that the doctrine of recent possession entitled the justices to infer, in the absence of any explanation by the accused, that he had knowledge of the true facts in which the property was obtained by Mrs. Honey.

It may, we think, be misleading to speak of the "doctrine" of recent possession in cases of receiving. It is a convenient way of referring compendiously to the inferences of fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts, including, in particular, the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found to be in possession of it.

The so-called "doctrine of recent possession" is not limited to cases of receiving nor to inferences as to the accused's knowledge or state of mind. The right inference from recent possession may be that the accused himself has stolen the property, as where he is found in the street near the scene of the house-breaking in possession of the property which has been taken from the house which has been entered. On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused's having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing, not merely that it had been unlawfully obtained, but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is unlawfully obtained is by stealing. But, conversely, where property has been obtained under circumstances which amount to misdemeanour, the inference cannot be drawn from its being found in his possession that he knew that it had been obtained in this much less common way as opposed to having been stolen. There may, however, in such a case be facts proved additional to the fact of recent possession which entitle the court to draw the inference that the accused knew the true facts as to the circumstances in which the property was unlawfully obtained, as where there is evidence of some association between the receiver and the person who obtained the goods, from which it might be inferred that the receiver was in the confidence of the other person, and knew what he had in fact done.

But the inference appropriate to the particular facts proved is not a presumption of law; it is merely an inference of fact drawn by applying common sense to the proved facts, and there is no "doctrine" that in a receiving case where recent possession on the part of the accused is proved he is presumed, in the absence of evidence to the contrary, to have known the true facts of the way in which the goods were obtained.

In the present case there was no evidence of any association between the accused and Mrs. Honey before he bought the refrigerator, or between that date and the date when he bought the television set. There was ample evidence that he knew that the goods had been obtained by dishonest means, and had the goods in fact been stolen and not obtained under the circumstances amounting to a misdemeanour there would, for the reasons we have already indicated, have been a case to answer on the charge of receiving them knowing them to have been stolen. But the facts proved against the accused are precisely those facts from which in so many cases a receiver's knowledge that goods had been stolen is rightly inferred, and we see nothing in the evidence from which the justices could infer that the accused knew that the property had been obtained in circumstances amounting to a misdemeanour as opposed to having been stolen. There was thus no evidence of what we have regretfully held to be an essential ingredient of the offences with which the accused was charged, namely, knowledge by him that the property which he received fell within the category of property which had been

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obtained in circumstances which amount to misdemeanour. This appeal must therefore be dismissed.

We should have been glad to have been able to come to a different conclusion, for this case illustrates the difficulty with which the prosecution is faced upon a charge of receiving where the goods have in fact been obtained by a misdemeanour such as false pretences. It seems the height of absurdity that the receiver should have committed no offence if he erroneously thought that the goods had been obtained by the graver crime of stealing; but, although it is the first time that the matter has come before the court, this appears to have been the law since the offence was first created in 1861, and if the matter is to be remedied, as we for our part think it should, only Parliament can do so.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions; J. H. Fellowes.*

J. D. P.

C. A.

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Oct. 6, 7.

Lord Evershed M.R., Sellers and Pearce L.JJ.

REGINA *v.* GOVERNOR OF BRIXTON PRISON.
Ex parte DE DEMKO.

Court of Appeal — Jurisdiction — Criminal cause or matter — Fugitive offender — Appeal against refusal to discharge — Jurisdiction as "superior court" — Whether appellate or original — Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *ss.* 10, 39—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31.

An application for a writ of habeas corpus and an application for an order granting relief pursuant to section 10 of the Fugitive Offenders Act, 1881,[1] were both refused by the Divisional Court of the Queen's Bench Division, and the applicant appealed against the refusal of the order under the Act of 1881:—

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[1] Fugitive Offenders Act, 1881, s. 10: "Where it is made to appear "to a superior court that by reason "of the trivial nature of the case, or "by reason of the application for the "return of a fugitive not being made "in good faith in the interests of "justice or otherwise, it would, "having regard to the distance, to "the facilities for communication, and "to all the circumstances of the case, "be unjust or oppressive or too severe "a punishment to return the fugitive "either at all or until the expiration "of a certain period, such court may "discharge the fugitive, either abso"lutely or on bail, or order that he "shall not be returned until after the "expiration of the period named in "the order, or may make such other "order in the premises as to the court "seems just."

S. 39: ". . . The expression "'superior court' means: (1) In "England, Her Majesty's Court of "Appeal and High Court of Justice; "and (2) In Scotland, the High Court "of Justiciary; . . ."

Held, that the general rule that the Court of Appeal has no appellate jurisdiction in cases involving a criminal cause or matter applies to applications under section 10 of the Fugitive Offenders Act, 1881; the jurisdiction conferred on the Court of Appeal by sections 10 and 39 of the Act of 1881 was original and not appellate; accordingly the court could not entertain the appeal.

Rex v. *Governor of Brixton Prison, Ex parte Savarkar* [1910] 2 K.B. 1056; 26 T.L.R. 561 (followed in *In re Henderson* [1950] 1 All E.R. 283) applied.

APPEAL from Divisional Court (Devlin, Donovan and Ashworth JJ.).

On February 19, 1958, Baron Kalman de Demko (hereinafter called the "applicant"), then resident in the United Kingdom, was arrested on a warrant issued at Johannesburg, South Africa, setting out a number of charges of fraud and theft which included one that he had converted to his own use a loan of £6,500 made in March, 1951, by a Mrs. Smith to a company known as Dawson's Transport (Tvl.) (Ppty.) Ltd. On June 17, 1958, the applicant was brought before the magistrate at Bow Street, Sir Lawrence Dunne, and a prima facie case was made against him. The magistrate committed the applicant to prison to await his return to South Africa. Application was made for leave to issue a writ of habeas corpus ad subjiciendum addressed to the Governor of Brixton Prison, and for an order granting relief pursuant to the Fugitive Offenders Act, 1881, s. 10. On July 14, 1958, the Divisional Court of the Queen's Bench Division of the High Court made an order refusing both applications. The applicant appealed against the refusal to grant relief under section 10 of the Act of 1881. A preliminary point of law was taken by Sir Harry Hylton-Foster Q.C., S.-G., for the Governor of Brixton Prison that the Court of Appeal had no jurisdiction to entertain the appeal.

Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn and *Basil Wigoder* for H.M. Secretary of State for Home Affairs and the Governor of Brixton Prison. A right of appeal in a criminal cause or matter was expressly excluded by section 47 of the Supreme Court of Judicature Act, 1873, and if that exclusion was to be modified by the Act of 1881, clear words would be needed. There is no room for mere implication from the normal functions of the Court of Appeal. *Ex parte Woodhall*[2] and *Amand* v. *Home*

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[2] (1888) 20 Q.B.D. 832; 4 T.L.R. 515.

Secretary and Minister of Defence of Royal Netherlands Government [3] show that the widest possible interpretation should be given to the expression "criminal cause or matter."

[*Lawton Q.C.* (for the applicant) intervening. It is conceded that this is a "criminal cause or matter" and that as regards the habeas corpus application there is no right of appeal.]

The exclusion applies also to applications under the Act of 1881. Section 10 confers jurisdiction on every "superior court" as defined in section 39. Nothing in section 10 suggests that the type of jurisdiction conferred on one such court may differ from that conferred on another also coming within the definition. In *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar* [4] Vaughan Williams L.J. assumed that the jurisdiction was concurrent in each court coming within the definition and that the Court of Appeal was not intended to have appellate jurisdiction. The court was plainly of opinion that the jurisdiction of the Court of Appeal under section 10 was original and it was not suggested that the court might have appellate jurisdiction as well. *Savarkar's* case [4] was followed in *In re Henderson*,[5] where the point was accepted without further argument as being settled law.

F. H. Lawton Q.C. and *P. A. W. Merriton* for the applicant. The application under section 10 of the Act of 1881 is different in nature and raises wider issues than an application for a writ of habeas corpus. Under section 10 the court may have to consider weighty and delicate matters, for it is a delicate matter to say of one of Her Majesty's Dominions that proceedings are oppressive and not bona fide or that one of Her Majesty's citizens has been taken overseas on a trivial charge. It may be that that was the reason why Parliament considered that there should be a right of appeal from a decision under section 10.

There is no direct authority on the issue in this case, and it is questionable how far the court is bound by the cases which have been cited. [Reference was made to *Young* v. *Bristol Aeroplane Co. Ltd.*[6] and *Morelle Ltd.* v. *Wakeling.*[7]] In *Savarkar's* case [8] Buckley L.J. said that the question of appellate jurisdiction was of considerable difficulty and had not been argued.

It is significant that in section 39 (2) no distinction is made between the Outer and Inner Houses in Scotland.

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[3] [1943] A.C. 147, 160; 58 T.L.R. 382; [1942] 2 All E.R. 381.

[4] [1910] 2 K.B. 1056; 26 T.L.R. 561.

[5] [1950] 1 All E.R. 283.

[6] [1946] A.C. 163; 62 T.L.R. 99; [1946] 1 All E.R. 98.

[7] [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708.

[8] [1910] 2 K.B. 1056.

The question is, what did Parliament intend in 1881 when the Act was passed? It was a fundamental conception of the Court of Appeal from its inception that the court should have only the jurisdiction which Parliament gave to it, and the court has been at pains to restrain attempts to foist onto it original jurisdiction. At one time it was thought that one could come to the Court of Appeal for a writ of habeas corpus, but see *In re Carroll.*[9] It would be very strange if Parliament had intended in 1881 to give original jurisdiction to the court in this matter. The Annual Practice shows that the cases in which the Court of Appeal has original jurisdiction are very few: see R.S.C., Ord. 58, r. 1, for an example. But whether or not the court has original jurisdiction, it clearly has appellate jurisdiction. The most that can be said against the applicant is that the effect of the statute is not clear, and in such circumstances the right of appeal ought not to be taken away. Section 10 is pregnant with a right of appeal, and the difficulty of construing the meaning of "superior court" should be resolved in favour of the subject. The principle stated in *National Telephone Co. Ltd.* v. *Postmaster-General*[10] is of general application.

The second question is whether, if a right of appeal is embedded in sections 10 and 39 of the Act of 1881, it has been taken away by subsequent legislation. Section 26 (2) (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925, preserves any appellate jurisdiction brought into existence between 1873 and 1925. Section 31 (1) of the Act of 1925 refers back to section 26 (2) (*d*), with the result that the appellate jurisdiction to deal with applications under the Act of 1881 is outside the exclusion of appeal in criminal causes or matters.

Savarkar's case[11] turned on the form of the order, and section 10 of the Act of 1881 was not in issue. The question may have been argued to some extent, but not in the way in which it is now put. The argument was in two stages. First, it was said that there was no appeal from the decision of the court dismissing the habeas corpus application. It is not sought to challenge that. Secondly, it was argued that the court had original jurisdiction, but the question whether the court had appellate jurisdiction was left open. Where a statute lays down no clear procedure, the court is free to make its own procedure in administering that statute: *Smith* v. *Williams.*[12]

[9] [1931] 1 K.B. 104; 47 T.L.R. 20.

[10] [1913] A.C. 546, 562.

[11] [1910] 2 K.B. 1056.

[12] [1922] 1 K.B. 158; 38 T.L.R. 116.

J. C. Phipps for the Government of South Africa.

Sir Harry Hylton-Foster Q.C., S.-G. in reply. It is not suggested that *Savarkar's* case [13] decided that the court had no appellate jurisdiction under sections 10 and 39. Section 6 leaves no room for an appeal to the Court of Appeal. If the applicant's submission is accepted, the consequence will be that the Secretary of State may make an order 15 days after habeas corpus proceedings have been determined despite further pending proceedings under section 10, so that the return of the offender may be ordered before the Court of Appeal can consider his application. It is submitted, if the matter is left in doubt by the Act of 1881, that the prohibition in section 47 of the Act of 1873 has not been disposed of. Counsel for the applicant submitted that matters of the utmost delicacy are involved in applications under section 10, but that applies equally to the habeas corpus application, and it has never yet been suggested that that would be a ground for giving appellate jurisdiction to the Court of Appeal to deal with habeas corpus applications.

LORD EVERSHED M.R. This is an appeal against an order made by the Divisional Court of the Queen's Bench Division on July 14, 1958. So far as relevant, that order reads: "Upon the application of Baron Kalman de Demko for leave to issue a writ of "habeas corpus ad subjiciendum and for relief pursuant to the "Fugitive Offenders Act, section 10," and after hearing counsel and reading evidence, "No order is made pursuant to the said "Act and the application that a writ of habeas corpus ad subjiciendum do issue is hereby refused."

My reading of the order sufficiently indicates the nature of the application. And it is to be noted that the greater part of the judgment of Devlin J. (which was the leading judgment in the Queen's Bench Division) dealt with and was related to the application under the Fugitive Offenders Act, 1881. I need not take time to read the judgment; but it appears from it that the applicant had been charged with certain offences which the judge said (as to one of them) could not in any circumstances be suggested as trivial; and he, therefore, concluded that it would not be unjust or oppressive that the applicant should be required to return to South Africa in order to stand his trial; nor did the judge think that the lapse of time since the alleged offences substantially altered the result.

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[13] [1910] 2 K.B. 1056.

The notice of appeal is dated July 29, 1958; and we agreed yesterday that we should expedite the appeal since it was a matter involving the liberty of the individual. Mr. Lawton, for the applicant, has not pressed that part of his original application which asked for leave to issue a writ of habeas corpus. He accepts that it must be taken now as clearly decided, by authorities binding upon this court (see, for example, *Ex parte Woodhall* [1] and *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* [2]), that the widest construction will be given to the formula in the Judicature Acts, " criminal cause or matter "; with the result that section 31 of the Judicature Act, 1925,[3] makes it plain that we have in this court no jurisdiction to entertain an appeal from a decision of the Divisional Court refusing leave to issue a writ of habeas corpus. But Mr. Lawton pressed his application under section 10 of the Fugitive Offenders Act, 1881, which (as he rightly observes) has not been the subject of any direct authority binding upon this court. But the Solicitor-General, for the Governor of Brixton Prison, has taken the preliminary objection that the same section—section 31 (1) of the Judicature Act, 1925—applies to an appeal, or a purported appeal, under the Fugitive Offenders Act, 1881, so that we in this court have no more jurisdiction to entertain such an appeal than we have to entertain an appeal in relation to the habeas corpus application.

In my judgment, the preliminary objection is well founded. I turn first to the Fugitive Offenders Act, 1881, itself. It is not in doubt that the alleged offences with which the applicant has been charged are within the scope of the Act and form the subject of the phrase a " criminal cause or matter." [His Lordship read section 10 and the definition of " superior court " in section 39 of the Act, and continued:]

The argument of Mr. Lawton is, briefly (and I hope I do it justice), as follows: Since by the express language of the definition section the Court of Appeal is included in the phrase " superior court " and, therefore, given jurisdiction, that jurisdiction must include the function which that court normally performs—namely, the function of hearing appeals. In support

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[1] (1888) 20 Q.B.D. 832; 4 T.L.R. 515.

[2] [1943] A.C. 147; 58 T.L.R. 382; [1942] 2 All E.R. 381.

[3] Supreme Court of Judicature (Consolidation) Act, 1925, s. 31: " (1) No appeal shall lie—(*a*) except " as provided by the Criminal Appeal " Act, 1907, or this Act, from any " judgment of the High Court in any " criminal cause or matter; . . "

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of that general proposition, Mr. Lawton referred (for example) to the language of Lord Parker of Waddington in *National Telephone Co. Ltd.* v. *Postmaster-General*,[4] where he said: "Where "by statute matters are referred to the determination of a court "of record with no further provision, the necessary implication is, "I think, that the court will determine the matters, as a court. Its "jurisdiction is enlarged, but all the incidents of such jurisdiction, "including the right of appeal from its decision, remain the "same."

As I have referred to that passage, I should add, in regard to it, that the real question before the House in the *National Telephone Co.* case [4] was whether the Railway and Canal Commission —which had been given jurisdiction as regards certain matters arising under the Telegraph (Arbitration) Act, 1909—was to act in regard to those matters as an arbitrator or as a court; and the House decided in favour of the latter view, with the consequence that, in the ordinary course, an appeal lay from the decision of the commission.

To revert to Mr. Lawton's argument: he added the further, by no means insignificant, point that the original jurisdiction of the creature of statute, namely, the Court of Appeal, is (to say the least of it) of an extremely limited character. (See, for example, the notes in the Annual Practice, 1958, p. 1651, to R.S.C., Ord. 58, r. 1.)

If sections 10 and 39 of the Fugitive Offenders Act, 1881, stood alone, and the matter were entirely res integra, I think that there would be great force in the submissions of Mr. Lawton. But if that were so—if, that is to say, he were right in saying that the reference to the Court of Appeal meant, by necessary inference, that it was to exercise in regard to these matters its ordinary appellate jurisdiction—then one would not suppose that the Court of Appeal had original jurisdiction in this kind of matter also.

I have said that there is no direct authority binding upon this court to the effect that this court has no appellate jurisdiction in these matters. But there is direct authority for the view that this court has an original jurisdiction. That authority (which has been much considered in the present hearing) is *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar* [5]; and as regards this matter of original jurisdiction, it seems to have been treated as authoritative in *In re Henderson*.[6]

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[4] [1913] A.C. 546, 562.

[5] [1910] 2 K.B. 1056; 26 T.L.R. 561.

[6] [1950] 1 All E.R. 283.

In *Ex parte Savarkar*,[7] an application had been made to the Divisional Court (as in the present case) both for leave to issue a writ of habeas corpus and also under section 10 of the Fugitive Offenders Act, 1881, the prisoner in question having been committed to prison under the latter Act. The Divisional Court had rejected the application; but (as appears clearly from the report) the order in fact drawn up was limited to a refusal to give leave to issue the writ of habeas corpus: it was wholly silent as to the Fugitive Offenders Act application. Savarkar having appealed, Sir Rufus Isaacs S.-G. took the preliminary objection (in much the same way as the present Solicitor-General has done in this case) that this court had no jurisdiction to entertain the appeal or the application at all. His argument ended as follows [8]: "The present case, it is true, arises under the Fugitive Offenders "Act, 1881, under which the appellant has been committed to "prison in this country to take his trial in another part of His "Majesty's dominions, but no trace is to be found in that Act "of an appellate jurisdiction being given to this court, and the "principle of the decision in *Ex parte Woodhall* [9] is decisive of "the present case." His argument was countered by Mr. Powell, for the prisoner; and, as reported, his argument closely reflects the argument of Mr. Lawton as I have tried to summarize it [10]: "By sections 10 and 35 certain powers are given to a 'superior "'court,' which expression is by section 39 defined to mean "'in England, Her Majesty's Court of Appeal and High Court of "'Justice.' It must be inferred from this that it was the "intention of the legislature to confer upon the Court of Appeal "an appellate jurisdiction in the case of applications made under "the Act, as the present application was made; there was no "other reason for including it in the definition of a superior "court." Mr. Powell then, however, concluded by this submission: "It is further submitted that under the Act of 1881 the "Court of Appeal has both an original and an appellate jurisdic-"tion, and, if necessary, the court is asked to hear the application "under the Fugitive Offenders Act, 1881, in the exercise of its "original jurisdiction." This court then, having observed the form of the order which was being appealed from, came to the conclusion that it did not deal at all with the application under the Fugitive Offenders Act, 1881; and, treating it as confined to the habeas corpus part of the case, they then proceeded to

[7] [1910] 2 K.B. 1056.
[8] Ibid. 1061.
[9] 20 Q.B.D. 832.
[10] [1910] 2 K.B. 1056, 1062.

dismiss the appeal. Counsel for Savarkar thereupon made an original application to the Court of Appeal, under the Fugitive Offenders Act, 1881; and Sir Rufus Isaacs S.-G. sought (persisting in his preliminary objection) to defeat that by saying that, upon a true construction of the statutes, an application under the Habeas Corpus Acts involved the application under the Fugitive Offenders Act, 1881, so that the latter must be treated as having, sub silentio, been dealt with by the dismissal of the habeas corpus application. Mr. Powell, upon that matter, was not called upon.

The leading judgment was delivered by Vaughan Williams L.J., who said [11]: "I start with the assumption that, under the "Fugitive Offenders Act, 1881, there is concurrent jurisdiction to "deal with such an application in each court which comes within "the definition of a 'superior court' given by the Act, and "therefore we have power to deal with such an application as a "court of first instance. . . . This being so"—that is to say, after referring to the definition giving power to the Court of Appeal to entertain originally the application—"in the absence "of anything to qualify the effect of this provision in the rest of "the Act, it necessarily gives to each of the courts which come "within the category of a 'superior court,' as defined by the "interpretation clause, jurisdiction to deal with such matters on "the same basis, not on the basis that one is a court of first "instance and the other is a Court of Appeal. It appears to me "that it cannot be that the Court of Appeal, having regard to "the provisions of section 47 of the Judicature Act, 1873, was "intended to exercise appellate jurisdiction in respect of matters "arising under an Act dealing entirely with procedure in a "certain class of criminal prosecutions." Later, he said [12]: "The ultimate conclusion at which I arrive is that the applicant "is entitled to make this application to us, first, because an "application such as this may be made to any court which "comes within the definition of a 'superior court' given by the "Fugitive Offenders Act, 1881; and secondly because, assuming "that no such application could be entertained after the matter "had once been adjudicated upon by a superior court, in my "opinion, we must look for such an adjudication in the record of "the court"; and then he points out that the record was silent upon it.

Fletcher Moulton L.J. said [13]: "In the first place I am

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[11] [1910] 2 K.B. 1056, 1069, 1070.
[12] Ibid. 1072.
[13] Ibid. 1073.

"satisfied that under sections 10 and 35 of the Fugitive Offenders "Act, 1881, jurisdiction is given to this court to hear an application of this kind, and that this jurisdiction is a jurisdiction "concurrent with that of the High Court, both this court and the "High Court being included in the designation 'superior court' "by virtue of that definition of that expression in section 39 of "the Act"; and Fletcher Moulton L.J. concluded his judgment thus [14]: "Therefore it must be taken that the questions raised "by the present application have not been heard and decided in "proceedings properly raising them before a court of concurrent "jurisdiction; and consequently, without deciding whether, if "they had been so heard and adjudicated upon, it would have "prevented us from hearing this application, it is open to us to "treat the matter as res nova, and not res judicata."

Buckley L.J. had taken a somewhat different view of the construction of the Act—a view more in conformity, it is fair to say, with Mr. Lawton's argument. He concluded his judgment as follows [15]: "There is one other point upon which I wish to say "a word. It is this: it would be another possible objection to "the original motion which, as the result of this judgment, we "are going to hear that, where the Act of 1881 refers to the "'Court of Appeal' as a 'superior court,' it means that court "sitting as a Court of Appeal. The learned Solicitor-General has "not thought fit to argue that point. I agree with what Vaughan "Williams L.J. has said to the effect that we must for ourselves "determine that point in order to hear this motion. As my two "brothers think that that point is to be resolved in favour of our "hearing the motion, of course that decides the matter. For my "own part, I have not heard the matter argued, and will only "say that I think it is a question of very considerable difficulty "whether, when this Act speaks of the 'Court of Appeal,' it does "not mean the Court of Appeal sitting as a Court of Appeal. It is "unnecessary for me to say more as to this point, because the "other members of the court do not think that is the meaning. "Under these circumstances I do not think that the preliminary "objection can be upheld."

What, then, so far as is relevant to this appeal, is the result of that case, which, I observe, was decided in 1910 and has not since been the subject of any adverse comment? I think, first, it provides clear authority (and I have already referred to the subsequent case *In re Henderson*[16]) for the view that, on the true construction of the Fugitive Offenders Act, 1881, the Court of Appeal has original jurisdiction to hear an application under section 10. I think it also clear that all three judges thought (to say the least) that it was extremely improbable that, by virtue of the definition section and its operation upon section 10, this court could have both original and appellate jurisdiction. Vaughan Williams L.J. expressly said that in his view it could not have both; and although Fletcher Moulton L.J. reserved the matter, it is, I think, clear enough from Buckley L.J.'s view that he thought that a choice would have to be made between the one and the other, though, if he had been left to himself, his own choice would have been by way of a preference contrary to that entertained by his colleagues. Third, I think that the case does contain, though no decision, at least indications which are contrary to the argument of Mr. Lawton; and I have for this purpose been careful to read the arguments of Sir Rufus Isaacs and Mr. Powell at the beginning of the hearing.

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[14] [1910] 2 K.B. 1056, 1076.

[15] Ibid. 1079.

I should, therefore, be disposed to think that the proper inferences to be drawn from *Savarkar's* case[17] are such as should guide us to decide the present case in the way which the Solicitor-General has contended. But in any event, given that there is to be taken as conferred by section 10 of the Fugitive Offenders Act, 1881, an original jurisdiction upon this court (as we must assume) then I conclude clearly that we cannot have also appellate jurisdiction.

I base that conclusion, briefly, on these steps. First, it is a necessary premise to Mr. Lawton's argument that, there being no express grant of appellate jurisdiction, we must find it in the inferences to be derived from the definition. In other words, to use Mr. Lawton's language, if one finds jurisdiction given to what is a Court of Appeal then there is pregnant in that conferred jurisdiction the notion of appellate functions. But against that submission one must bear in mind that the Act of 1881 succeeded by eight years the passage of the Supreme Court of Judicature Act, 1873. That was the Act which consolidated the various courts which had up to then been distinct—the Court of Chancery, the Court of Exchequer, the Court of Queen's Bench, and so forth—into a single supreme court, and created, as part of the supreme court, this court, the Court of Appeal.

The jurisdiction and functions of the Court of Appeal are dealt with in the appropriate sections of the Act, of which I can confine myself to a reference to one, namely, section 47, which provides: "The jurisdiction and authorities in relation to questions of law "arising in criminal trials which are now vested in the justices "of either bench and the barons of the Exchequer by" (a certain Act) "shall and may be exercised after the commencement of "this Act by the judges of the High Court of Justice, or five of "them at the least," (which include certain named ones). The section concludes: "The determination of any such question by "the judges of the said High Court in manner aforesaid shall be "final and without appeal; and no appeal shall lie from any "judgment of the said High Court in any criminal cause or "matter, save for some error of law apparent upon the record, as "to which no question shall have been reserved for the considera"tion of the said judges under the said Act of the eleventh and "twelfth years of Her Majesty's reign."

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[16] [1950] 1 All E.R. 283.

[17] [1910] 2 K.B. 1056.

If that section is borne in mind, it seems to me no longer true to say, necessarily, that a reference to the Court of Appeal in such a context as one finds in the Fugitive Offenders Act, 1881, connotes or carries with it the notion of the exercise of appellate function. The Court of Appeal was a creature of statute then only a few years old; and in the statute which created the Court of Appeal it had been clearly laid down that in regard to criminal causes or matters no appeal should lie to it: it should have no appellate jurisdiction or function.

The matter, however, does not entirely rest there. I think that there are indications supporting that view to be found in the Fugitive Offenders Act, 1881, itself. They may be slight, but they do (as I think) point in the same direction. One is to be derived from section 6 of the Act. That section provides: "Upon "the expiration of 15 days after a fugitive has been committed "to prison to await his return, or if a writ of habeas corpus or "other like process is issued with reference to such fugitive by a "superior court, after the final decision of the court in the "case . . ."; a form of words which (I agree with the Solicitor-General) does not, on the face of it, seem to fit at all readily with the notion that there might be an appeal from one part of the "superior court" to another. And if one looks at the definition itself, it is "'superior court' means, in England, "Her Majesty's Court of Appeal and High Court of Justice." I should have thought that if it had been intended by this somewhat oblique method to confer upon, or to indicate an appellate jurisdiction in, the Court of Appeal it would have been much more natural to have reversed the order and said "the High "Court of Justice and the Court of Appeal." For what it is worth, it is to be noted that no definite article appears before "High Court." I therefore read the relevant definition of "superior court" as merely synonymous with "the Supreme "Court of Judicature" established by the Act of 1873, and without having any reference in it, implicit or otherwise, to an appellate jurisdiction conferred upon part of that court.

Mr. Lawton did refer to the fact that there is no similar distinction, in the reference to the High Court of Justiciary in Scotland, between the Outer House and the Inner House. I do not, however, think that that matter carries any weight in the context.

Those are the reasons, therefore, which have persuaded me that, apart from any implications of the *Savarkar* case,[18] the right answer is that, given original jurisdiction in this court, we have not got at the same time appellate jurisdiction.

There remains, finally, the Judicature Act, 1925. Mr. Lawton referred first to the language of section 26 of that Act, headed "Jurisdiction of the Court of Appeal." It provides, by subsection (1): "The Court of Appeal shall be a superior court of "record"; and, by subsection (2): "There shall be vested in the "Court of Appeal . . . (*d*) All jurisdiction which, under or by "virtue of any enactment which came into force after the com-"mencement of the Act of 1873 and is not repealed by this Act, "was immediately before the commencement of this Act vested "in or capable of being exercised by the Court of Appeal con-"stituted by the Act of 1873." In those words, Mr. Lawton finds secreted (if I may use the word without offence to his argument) a reference to the jurisdiction (he says the appellate jurisdiction) conferred by section 10 of the Fugitive Offenders Act, 1881, which, therefore, is expressly preserved; and he submits that in section 31 (1), which reads: "No appeal shall "lie—(*a*) except as provided by the Criminal Appeal Act, 1907, "or this Act, from any judgment of the High Court in any "criminal cause or matter," the three words "or this Act" refer back to (*d*) so as to preserve the appellate jurisdiction of this court in the Fugitive Offenders Act cases.

The argument is, if I may say so, ingenious, but I find it not persuasive. One has to begin by the consideration that the Judicature Act, 1925, is expressed to be a consolidating Act; and one does not look for substantial changes in the law, or the jurisdiction, in a consolidating Act—and one certainly would not be astute to find them in language so extremely obscure as that which I have read, if it is to be applied for this purpose. Indeed, in remembering that this is a consolidation Act one has also to remember that Parliament must be taken to have been aware of the decisions of the courts in the meantime, and particularly of the decision of *Savarkar's* case [19] in 1910.

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[18] [1910] 2 K.B. 1056.

I have already indicated that if this argument were to prevail it would appear that the draftsman had preserved the right in language more obscure and oblique than one would think possible. But in truth the plain language of the section seems to me to be in entire conformity with the argument of the Solicitor-General. The words "or this Act" in section 31 have a context and an application in another section, section 29, of the Act [20] and are not, therefore, left so to speak entirely in the air; and, as I read them according to their ordinary sense, I think that the Act of 1925 rather confirms and supports the implications which I have drawn from the earlier legislation than otherwise.

For these reasons, I think that the preliminary objection here must prevail, and that we must hold in this matter that we have no jurisdiction to entertain an appeal. I would, therefore, on that ground dismiss the appeal.

SELLERS L.J. I, too, would uphold the submission of the Solicitor-General that this court has no jurisdiction to entertain this appeal.

I agree so fully with the reasons given by my Lord that I do not propose to reiterate them in less impelling words of my own. Although many attempts have been made to persuade this court that it should hear appeals from decisions in habeas corpus proceedings, they have been consistently refused where the matter has been one of a criminal nature or relating to a criminal cause or matter. This is the first time that an attempt has been made to persuade this court that it has a power and duty to hear an appeal under section 10 of the Fugitive Offenders Act, 1881—and the period of time from 1881 to the present is a considerable one—the first time notwithstanding that in 1910 Buckley L.J. raised the question and expressed his view on the matter as my Lord indicated in his judgment. Forty years after 1910 this court did in fact, in *In re Henderson*,[21] hear a case on an original application to it under section 10. The Fugitive Offenders Act, 1881, and in particular section 39 thereof, makes it clear that this court has some jurisdiction. It has been held in 1910, and acted upon since, that that jurisdiction is an original jurisdiction. Unless it can be said that there can be a dual jurisdiction, both original and appellate, then that decision as far back as 1910 and existing unchallenged up to the present time would establish that the jurisdiction has already been decided to be original and would be binding on this court. On the reasoning which my Lord has advanced, and on the argument on which the Solicitor-General relied, it does not seem possible in my view to say that the jurisdiction given to this court was a dual one. For myself (and this is why I have ventured to make one or two observations in addition to those of my Lord), if the matter were to come afresh I think my view would be that I should agree with the views taken by Vaughan Williams L.J. and Fletcher Moulton L.J., that the proper interpretation of the words which have been relied on does give an original jurisdiction and not an appellate jurisdiction to this court. It may seem, in the light of what had taken place only a few years before—that criminal matters were excluded from the purview of this court—a little strange, perhaps, that such original jurisdiction should be given, but I think it would be even more strange if the statute were to give, in such words as exist for our consideration, an appellate jurisdiction, even though limited, in those matters which have been so clearly excluded.

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[19] [1910] 2 K.B. 1056.

[20] Supreme Court of Judicature (Consolidation) Act, 1925, s. 29: "An appeal shall lie to the Court of "Appeal from a conviction on indict-"ment at common law in relation to "the non-repair or obstruction of any "highway, public bridge or navigable "river, in whatever court the indict-"ment is tried, and shall not lie under "the Criminal Appeal Act, 1907."

I only add those few observations in support of the judgment which my Lord has given.

PEARCE L.J. I agree with all that my Lords have said.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Director of Public Prosecutions; Beach & Beach; Jaques & Co.*

E. D.

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[21] [1950] 1 All E.R. 283.

LUND *v.* THOMPSON.

1958
Oct. 21.

Lord Parker C.J., Streatfeild and Diplock JJ.

Road Traffic—Notice of intended prosecution—Subsequent withdrawal of notice—Second notice given out of time—Validity of first notice—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

On February 14, 1958, the defendant was served by the police with notice of intended prosecution under section 21 (*c*) of the Road Traffic Act, 1930,[1] for dangerous driving and driving without due care and attention. Thirteen days later, on February 27, another letter was sent to the defendant by the police stating that after careful consideration the police had decided not to take any further action in the matter. On March 13, a fortnight later, and out of time, a third letter was sent to the defendant stating that after further consideration, the commissioner of police had decided to institute proceedings against the defendant. The defendant was convicted on the lesser charge. On appeal on the ground that the notice of intention to prosecute was out of time:—

Held, that once a notice of intended prosecution under section 21 (*c*) of the Act of 1930 has been given either by the police or a member of the public, the condition precedent to a conviction had been fulfilled, and the subsequent cancellation of the notice did not affect the matter; accordingly, the defendant was properly convicted.

Case stated by Mr. Paul Bennett, metropolitan magistrate, sitting at Marlborough Street.

On March 13, 1958, informations were laid by the prosecutor against the defendant charging him with unlawfully driving a motor-vehicle on February 11, 1958, at Eaton Gate, S.W.1, in a manner dangerous to the public and without due care and attention contrary to sections 11 and 12 (1) of the Road Traffic Act, 1930.

At the hearing on April 18, the magistrate found the following facts:

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[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an "offence under any of the provisions "of this Part of this Act relating "respectively to the maximum speed "at which motor-vehicles may be "driven, to reckless or dangerous "driving, and to careless driving he "shall not be convicted unless either "—(*a*) he was warned at the time the "offence was committed that the "question of prosecuting him for an "offence under some one or other of "the provisions aforesaid would be "taken into consideration; or (*b*) "within fourteen days of the commission of the offence a summons for "the offence was served on him; or "(*c*) within the said fourteen days a "notice of the intended prosecution "specifying the nature of the alleged "offence and the time and place "where it is alleged to have been "committed was served on or sent by "registered post to him or the person "registered as the owner of the "vehicle at the time of the commission of the offence."

On February 14, 1958, a notice of intended prosecution was served on the defendant, being signed by the acting superintendent of police. On February 27 a letter was sent to the defendant signed by the acting chief inspector of police stating that after careful consideration the police had decided not to take any further action in the matter. On March 13, a further letter was sent to the defendant on behalf of the assistant commissioner of police, referring to the letter of February 27, and stating that after further consideration the commissioner had decided to institute proceedings against the defendant for driving in a manner dangerous to the public, and for driving without due care and attention.

It was contended by the defendant that section 21 of the Road Traffic Act, 1930, had not been complied with in that the notice of intended prosecution had been withdrawn by the letter of February 27, and the only effective notice of intended prosecution received by him was the letter dated March 13, and this was sent more than 14 days after the commission of the offence alleged. It was contended by the prosecutor that the notice of intended prosecution was valid and could not be, and was not in fact, withdrawn.

The magistrate was of the opinion that section 21 of the Road Traffic Act, 1930, had been complied with in that the notice of intended prosecution dated February 14 was a valid notice and had not been invalidated by any subsequent event. Accordingly, he was of the opinion that he had jurisdiction to hear the informations, and did so. The defendant pleaded Guilty to driving without due care and attention and Not Guilty to driving in a manner dangerous to the public. The magistrate dismissed the charge of driving in a manner dangerous to the public and fined the defendant £5 with £5 costs for driving without due care and attention and ordered his licence to be endorsed.

Cecil Binney for the defendant. It is not disputed that a notice was validly drawn up and served, but the police cancelled this notice, with the result that the position is the same as if no notice has been served. There appears to be no case in which a prosecution has been allowed to proceed on a notice which was subsequently withdrawn. The effect of the first notice was completely nullified by the letter of cancellation. The letter of March 13 cannot be treated as giving statutory notice as it was out of time. The police must be entitled to withdraw a notice of intended prosecution. The police acted in a wholly unreasonable manner, and from the fact that the defendant pleaded Guilty in these circumstances, it does not follow that he would have pleaded Guilty if he had been treated reasonably. [*Pope* v. *Clarke* [2] was referred to.]

E. A. Machin for the prosecutor. It is not possible in law to withdraw a notice of intended prosecution once such a notice has been validly given. On the facts of the case, even if it were possible, notice has not been withdrawn. If this were not so, even an aggrieved private person would be prevented from prosecuting. A notice of intention to prosecute is not binding on the Crown; it is a mere expression of intention and cannot estop the process of the criminal law. It would in any event require the most express terms of withdrawal to accomplish a cancellation. How can it be suggested in this case that the second document revoked the first to which it did not even refer?

LORD PARKER C.J. I will ask Diplock J. to deliver the first judgment.

DIPLOCK J. stated the facts, read section 21 of the Road Traffic Act, 1930, and continued: The purpose of section 21 is clear and has been expressed by this court on a number of occasions, namely, that a person concerned in a traffic accident should be informed at an early stage of the intended prosecution so that he can obtain his witnesses and prepare his case. Mr. Binney has argued that paragraph (*c*) of section 21 must be read as containing by implication some such words as "notice of intended prosecution was served or sent by registered post to him and has not been withdrawn," or else that the effect of the letter of February 27 is to nullify or cancel the effect of the first notice. A possible alternative way of putting it would be no doubt that as the result of the second letter the police were estopped from proceeding with the prosecution. It seems to me that in Mr. Binney's argument there is implicit a fundamental fallacy that only the police can prosecute for an offence of this nature. That is not so. Although, in all but an infinitesimal number of cases, no doubt information is laid and the prosecution is conducted by a particular police officer, that is not by virtue of his being a police officer; he is exercising the right of any member of the public to lay an information and to prosecute an offence. It therefore follows that when one looks at the three alternative conditions precedent to conviction laid down by section 21, the warning, the serving of the summons or the giving of the notice of intended prosecution, such warning may be given and such summons served or such notice given by any member of the public and not merely by a police officer; and that when such a warning has been given, summons served or notice of intended prosecution given it may be taken advantage of by anyone who wishes to prosecute. It would, indeed, be difficult to argue that where a person has been warned at the time of the accident under section 21 (*a*), a letter written by the police afterwards saying that they did not intend to prosecute would nullify the effect of the warning and so prevent anyone else prosecuting for that offence. It seems to me that the same considerations apply to paragraph (*c*), and that it is impossible to read into that paragraph the words which Mr. Binney seeks to imply. Paragraph (*c*) requires that a notice should be given of intended prosecution, it matters not by whom, within the period laid down by the paragraph, and once that is given, the condition precedent and the only condition precedent to a conviction is fulfilled.

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[2] [1953] 1 W.L.R. 1060; [1953] 2 All E.R. 704.

Having come to the conclusion that that is the construction of the Road Traffic Act, 1930, it must not be thought that the habit of sending a letter to say that proceedings will not be brought, and then subsequently sending a letter saying that the police have changed their mind, is a practice to be commended. It is one which may lead in certain circumstances to considerable injustice to the person prosecuted; but though that may be so, it does not seem to me that the court can be induced to read further words into the plain words of the Act. It is also to be observed that one of the ultimate sanctions of the rule of law in this country is the right of private persons to lay informations and bring prosecutions. If Mr. Binney's argument were right, it would be possible for the police to use a dispensing power in relation to an intended prosecution by sending a notice under section 21 (*c*) by one post and withdrawing it by the next post. In my view, this appeal should be dismissed.

STREATFEILD J. I agree, but do so with some reluctance. I base my opinion solely on the construction of section 21. It seems to me that, reading the three alternative requirements together, if a policeman was on the spot when an accident took place and, in fact, warned an offender that the question of his prosecution would be taken into consideration, no amount of subsequent intimation that a prosecution was not going to take place would obliterate the fact that he had been warned, which is the only requirement of section 21 (*a*). In the same way, if a summons were served within 14 days and proceedings actually commenced under paragraph (*b*), no amount of intimation that the summons was not going to be proceeded with would, as it were, undo that summons. Similarly, under paragraph (*c*) where notice has been given of intended prosecution within 14 days, no amount of cancellation of that notice would obliterate the fact that notice was given—and that, on the true construction of this section, is all that is required—that either a warning should be given at the time, or proceedings shall be commenced within 14 days, or a notice of intended prosecution shall be given within 14 days. So long as one or other of those conditions precedent is fulfilled, there is no bar to a conviction. Within the four walls, therefore, of section 21, I agree that Mr. Binney's argument in this court must fail. At the same time, when one bears in mind that the basis of the requirements of section 21 is that a person who may be accused of an offence under section 11 or section 12 of the Road Traffic Act, 1930, may be given fair warning or a fair chance to prepare his defence and to call his witnesses, one sees at once that the statement in a printed form, that the police have decided not to take any further action after all, having previously given notice that they intend to prosecute, may cause an accused person to experience a sense of false security and he may allow his witnesses to disperse to the four corners of the world beyond recall. Then, if the police afterwards change their minds and give him notice that they intend to prosecute after all, he may be left in the air so far as his witnesses are concerned. It may therefore be, if that is encouraged, that the purpose of section 21 may fail. I do not say that there is any question of any injustice having resulted in this case because the defendant in fact pleaded Guilty to careless driving and was dealt with on that basis. Of course, some people may even be induced to plead Guilty because they have no witnesses to satisfy the court of their innocence. Although no injustice may have been done in this case, one can conceive that there might be a case where a notice of intended prosecution is given, and then for all practical purposes withdrawn when, if it is reinstated afterwards, it may well work an injustice. One can only say that one can rely, and I am sure with confidence, upon the integrity of the police and still more upon the integrity of the justices to see that no man in fact suffers injustice through it. But one can well sympathise

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with a man who, having been given a notice by the commissioner of police, having been served with a purported cancelling notice by the same authority, and then out of the blue there comes another letter from the same authority saying that after all he is going to prosecute, feels a sense of grievance. Nevertheless, in my view, on a true construction of section 21, what was done in this case was done within the four corners of that section. It is for those reasons, therefore, that I agree with the judgment of Diplock J.

LORD PARKER C.J. With some regret I have come to the same conclusion and I have nothing to add.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.; Solicitor, Metropolitan Police.*

J. D. P.

C. C. A.

REGINA v. CUNNINGHAM.

1958 Dec. 8.

Lord Parker C.J., Cassels and McNair JJ.

Criminal Law—Wounding—Provocation—Whether a defence.

The defence of provocation is available only to a person charged with murder in order to reduce the charge to manslaughter.

Where, therefore, the appellant was charged with malicious wounding and he put forward the defence of provocation consisting of words spoken to him by the person injured:—

Held, that the defence of provocation was not open to him.

Dictum of Viscount Simon in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, 601; 62 T.L.R. 466; [1946] 2 All E.R. 124 applied.

APPEAL against conviction and sentence.

The appellant raised the defence of provocation to a charge of malicious wounding. In the course of the trial the prosecution was allowed, as the result of a question put by counsel for the appellant to the injured person, to cross-examine the appellant as to his previous convictions. The appellant was convicted and appealed on the ground that leave to the prosecution to cross-examine as to previous convictions ought not to have been allowed, because if provocation was a proper defence to the charge the question put was itself proper because it was necessary to the foundation of the defence.

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R. H. Tucker for the appellant. The defence of provocation was left to the jury by the deputy chairman in his summing-up. If it was a proper defence, the question put to the injured person was itself proper because it was necessary for the foundation of the defence. In *Holmes* v. *Director of Public Prosecutions*[1] Viscount Simon said[2]: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived." This implies that the defence of provocation is open in cases other than murder—certainly in the case of inflicting grievous bodily harm, and, by implication, in cases of a less grave nature. In *Reg.* v. *Cunningham*[3] it was held that a case of unlawful wounding is one which requires malice, and malice was interpreted as requiring some ingredient of intent. If that is so, provocation offers a defence, in that it negatives the malice which the law requires.

Malcolm Ward, for the Crown, was not called on.

Lord Parker C.J. The appellant was convicted at the Worcester County Quarter Sessions of malicious wounding and he was sentenced to five years' imprisonment. He now appeals to this court against his conviction and his sentence.

The appellant was travelling on a bus with his dog and had a cane or a whip with him. As he moved to get off the bus he passed another passenger called Trueman, and according to the appellant, Trueman said: "Oh, you are getting off here Jack, I thought you were coming to Droitwich with me." Thereupon the appellant made a most savage attack on Trueman, hitting him about the face and, as a result, he had a wound in the ear, abrasions on the hand and wrist and an injury to the left eye.

The defence put up at the trial was that that remark made by Trueman was intended as a suggestion that he, the appellant, should go with Trueman and commit some homosexual offence, and it was by reason of that that he was provoked, as he said, and attacked Trueman. In the course of the trial, Mr. Tucker, his counsel, in cross-examining Trueman said: "I must suggest that by that remark you meant and he understood you to mean that you were to go together and behave in a homosexual manner? (A) Well, really that is fantastic, and I think that

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[1] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[2] [1946] A.C. 588, 598.

[3] [1957] 2 Q.B. 396, 399; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412.

"it is incredible, because do you think," and thereupon the deputy chairman quite rightly interrupted and said: "Mr. Tucker, "do you realise where this is leading to?" Mr. Tucker persisted and went on a little later: "Did I have your answer to that "question? (A) I said that it would be incredible that I should "make any suggestion of any kind." Then the deputy chairman wrote down the answer: "I did not suggest that he should go to "Droitwich and behave in a homosexual manner." As the result of that, when the appellant went into the witness box the prosecution sought to cross-examine him as to his previous convictions and the deputy chairman allowed that to be done with the result that four previous convictions for violence were brought out and were before the jury.

The appeal is based on the ground that leave to the prosecution to cross-examine the prisoner as to his previous convictions ought never to have been allowed. If provocation is a proper defence to a charge of this sort, then counsel must, so it is said, be allowed to put that question to the victim without having the prisoner's convictions brought out in court. It seems to the court that it is unnecessary to determine that question, though I think that, even if provocation was a proper defence, a question such as was put in this case must of necessity bring in the character of the prisoner, but in this case the court is clearly of opinion that in a case such as malicious wounding, there is no such thing as a defence of provocation. That defence only arises in a case of murder to reduce murder to manslaughter. That, it seems to us, is made clear by Viscount Simon in *Holmes* v. *Director of Public Prosecutions*.[1] It is true that he said[2]: "The whole doctrine "relating to provocation depends on the fact that it causes, or "may cause, a sudden and temporary loss of self control whereby "malice, which is the formation of an intention to kill or to "inflict grievous bodily harm, is negatived." There it seems to the court clear that Lord Simon was dealing and dealing only with a defence of provocation in a murder case. The matter is put perfectly clearly by him where, after referring to the fact that provocation may reduce murder to manslaughter, he goes on[3]: "In the case of lesser crimes, provocation does not alter "the nature of the offence at all: but it is allowed for in the "sentence."

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[1] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[2] [1946] A.C. 588, 598.

[3] Ibid. 601.

Accordingly, in the judgment of this court the defence of provocation was not open to the appellant, and, therefore, there was no defence, and the fact that his convictions were before the jury could have made no difference.

There is yet another difficulty in the way of the appellant, namely, that, even if provocation could be a defence, there is no suggestion that words alone, except in a case under the Homicide Act, 1957, are sufficient to found a defence of provocation. For these reasons the appeal against conviction is dismissed.

As regards the appeal against sentence, it is true that the prisoner was given the maximum sentence, but having regard to his record of violence, there was no surprise in that. Both appeals accordingly are dismissed.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Thomas Horton & Sons, Bromsgrove.*

J. D. P.

REGINA *v.* JONES.

C. C. A.
1959
Jan. 26.

Lord Parker C.J., Donovan and Ashworth JJ.

Criminal Law—Homicide—Killing in course of other offence—Theft—"In course . . . of theft"—Money stolen from shop—Murder on premises to escape detection—Whether "in the course . . . of theft"—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 5 (1) (*a*).

The appellant broke into a store and took money from a safe upstairs. When he was about to go downstairs, the front door clicked, the downstairs light went on and the manager of the store came upstairs. When he was near the top of the stairs the appellant struck him a fatal blow. The appellant was convicted of capital murder under section 5 (1) (*a*) of the Homicide Act, 1957. He appealed, alleging that, as he had decided to leave the premises before he heard the front door open, the theft was complete and he was no longer acting "in the course . . . of theft" when he struck the manager, and, therefore, he could not be guilty of capital murder:—

Held, that where a man, having stolen money and while still at the scene of the theft, in order to escape detection, committed murder, that was murder "in the course . . . of theft" and was capital murder.

H.M. Advocate v. *Graham*, 1958 S.L.T. 167 followed.

APPEAL against conviction.

On September 30, 1958, at about 9 p.m., the appellant, Ernest Raymond Jones, broke into a co-operative society stores near

Huddersfield. Downstairs, he collected some cigarettes which he put into a carton ready to take away from the premises. He then went upstairs, where, as the result of a previous successful burglary, he knew there was a safe. To his surprise he found the safe open, and took about £70 from the safe and put it into his pocket: he decided to leave the premises forthwith: he did not steal anything else after taking the money. He was on his way out and about to go downstairs when he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour at the top of the stairs. The man who had just entered was the manager of the store; he came up the stairs and when near the top of the stairs he received a blow from the appellant, as a result of which he died, and it was found that his skull was fractured in five places. The appellant was charged with capital murder.

At his trial the appellant's defence was that he had merely pushed the manager, who must have struck his head and fractured his skull in falling, and that he had no intention of doing grievous bodily harm to the manager and certainly no intention of murdering him, but if it were held that his acts constituted murder, nevertheless it was not murder done in the course or furtherance of theft so as to constitute capital murder within the meaning of section 5 (1) (*a*) of the Homicide Act, 1957.[1] The appellant was convicted of capital murder.

He appealed on the ground that his defence with regard to capital murder was not put to the jury. That defence was, that having found the safe door open, he thought that someone had been there before him and he took fright; he took what money he could lay his hands on and decided to leave at once, without even taking the cigarettes he had collected downstairs. At that moment his theft was complete, and he was no longer acting "in the course . . . of theft" when he struck the manager.

Bernard B. Gillis Q.C. and *Lionel H. Scott* for the appellant. The appellant's defence to the charge of capital murder depended on the fact that, having found the safe door open, it at once occurred to him that someone else had broken in and gone to the safe before him, so that he decided to go away as soon as he had taken the money from the safe. Once he had taken the money the theft was complete. The jury should have been directed that once the theft was complete the appellant was no longer acting in the course of theft; that if they found that, having stolen the money, the appellant was in the act of leaving the premises when he struck the manager down, that was not capital murder. The judge indicated that he agreed with the defence submission that "in furtherance of theft" means a further act preparatory to the commission of the offence.

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[1] Homicide Act, 1957, s. 5 (1): ". . . the following murders shall be "capital murders, that is to say,— "(*a*) any murder done in the course "or furtherance of theft; . . ."

[DONOVAN J. I don't see why "in the furtherance of" does not mean successfully getting away, but you don't have to deal with that in view of the way in which the case was put.]

The present case on capital murder turned only on the phrase "in the course . . . of," which means while the act is going on. The jury received no direction as to the meaning of "in the "course . . . of." The case was left to the jury as if it were one where the appellant was interrupted in the course of thieving. This was not a case where a person while engaged in thieving hears the householder and as a result decides to leave. In that case the theft might not be complete, but in the present case it was, because the appellant had completed his thieving and decided to leave before he heard the manager. Once the appellant decided to leave, the offence of thieving was completed. The appellant's evidence showed that he had decided to leave long before the arrival of the deceased on the premises. He was not disturbed by the manager when he was stealing but when he was leaving. Unless "in the course . . . of" includes successfully taking the proceeds of the theft out of the premises, then the case was not properly put to the jury. The appellant's case would have been much weaker if he had said: "I was stealing. "I heard someone and decided to go." But here it was the unparalleled fact of finding the safe door open which decided him to leave, and that was a factor so unusual that it would have been surprising if the jury had not accepted it, not only because it might have been true but because it would have decided a dishonest person to leave as quickly as possible.

[LORD PARKER C.J. If the only thing to steal had been the money in the safe upstairs and a thief had gone upstairs, taken the money out of the safe so that there was nothing more to steal and put it into his pockets, the larceny would then be completed. If he is then disturbed, why is that not "in the course . . . of "theft"?]

In the course of an act can only mean while that act is going on or during that act; if that act is complete and the thief then goes downstairs and meets the householder and strikes him, that is not while he is doing the thieving or during the theft, but after the theft. The words "in the course . . . of theft" are not wide enough to cover Lord Parker's example. If they were, where would "in the course of" end? If "in the course of" could cover leaving the premises, then surely one would have to extend them to cover the burglar who kills on the roadway 100 yards from the house. That would extend the offence of capital murder beyond what was intended by the legislature.

This summing-up was defective in a vital respect in that the substance of the defence to capital murder was not brought to the attention of the jury. The jury should have been directed as a matter of law that if the theft had been completed notwithstanding that the appellant was still on the premises, he was no longer acting in the course of theft.

[Reference was made to *H.M. Advocate* v. *Graham*.[2]]

Geoffrey Veale Q.C. and *R. Withers Payne*, for the Crown, were not called upon.

LORD PARKER C.J. The appellant was convicted at Leeds Assizes of capital murder and he now applies for leave to appeal against his conviction.

The facts are in a very short compass. On September 30, 1958, at about 9 p.m., he broke into a co-operative society stores near Huddersfield. He collected downstairs some cigarettes which he put into a carton ready to take away from the premises. He then went upstairs, where, as the result of a previous successful burglary, he knew there was a safe. To his surprise he found that the safe was open. He took silver and notes to the tune of about £70 out of the safe and put it all or most of it into his pocket, and he was about to descend the stairs when he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour. In fact the man who had come into the premises was the manager of the store, and he came up the stairs apparently in order to shut up and to close the safe. When he was near the top of the stairs he received a blow from the appellant, as a result of which he died, and it was found that his skull was fractured in five places.

The appellant's first defence was based on an alibi, but that was not persisted in. At the trial his case was that he had merely pushed the manager who must have struck his head and fractured his skull in falling. At any rate, his case was that he had no intention of doing the manager grievous bodily harm let alone committing murder, and finally that, even if it were held that his acts constituted murder, yet it was not murder done in the course or furtherance of theft so as to constitute capital murder within the meaning of section 5 (1) (*a*) of the Homicide Act, 1957.

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[2] 1958 S.L.T. 167.

As regards the defence that he had no intention to inflict grievous bodily harm or murder, no complaint is made whatsoever of the very careful directions given by the judge both on the law and on the facts. It is sufficient to say that there was ample evidence on which the jury could come to the conclusion that this was murder and not manslaughter. The real point taken on this appeal concerns the question whether the murder was committed in the course or furtherance of theft so as to constitute capital murder. It is said that if the appellant were to be believed the theft was complete. His case was, that having found the safe open, he thought somebody had been there recently, that he took fright, that he took what money he could immediately lay his hands on and decided then and there to leave the premises without looking round for anything else to take, and without even collecting the cigarettes which he had put aside. In other words, his case was that he took fright and that, quite apart from the clicking of the front door, he had determined to go.

It is said that that defence was never adequately put to the jury. In the view of this court the defence was put, true not in very great detail, but it was adequately put. But the matter does not end there. Even if this were a case in which the defence had not been properly put, it does not seem to this court that the argument is sound that if a man may be charged with thieving the offence is complete for all purposes, so that if thereafter in an attempt to avoid detection he strikes somebody and commits murder that it is not capital murder. This was a case where the prisoner was caught red-handed at the scene of the theft, and in order to avoid detection he committed murder. It is difficult to see why that should not be within the words "in the "course . . . of theft."

The court has been referred to the summing-up by Lord Sorn in *H.M. Advocate* v. *Graham.*[1] The facts do not matter, but in the course of summing up Lord Sorn said this[2]: "Now you have just heard it suggested to me by "counsel for the defence that murder is only done in the course "of theft if the man did it in order to get on with the theft after

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[1] 1958 S.L.T. 167.

[2] Ibid. 169

"he had done the murder. I think that was the suggestion. I "have only got to tell you that I do not agree with that. It is a "question of what is meant by the course of a theft, and I think "that the course of a theft is begun when perpetration is begun; "that is to say, that it covers the period of attempt as well as "the period of completion; the attempt of the crime as well "as the crime; and I say that if a burglar is interrupted in that "course, the course of perpetration, and if he murders even in "order to get away, not with the idea of going on, but with the "idea of getting away, it still is murder done in course of theft. "It would be, I think, somewhat ridiculous to suppose that "Parliament has said: 'We will make it murder if the house-"'holder who wakes up and goes to interfere with a burglar and "'gets killed by a burglar who kills him in order to go on with "'his stealing, but we won't make it capital murder if the "'burglar murders him in order to run away.' I think it does "not matter what he was going to do afterwards; or what he did "afterwards; if he was in course of theft and he did the killing, "it is 'in course of' within the meaning of section 5 of the "Homicide Act; and I so direct you in law."

In the view of this court that summing-up of Lord Sorn was perfectly correct and the court agrees with what Lord Sorn there said. The court would only add that for the purposes of this case it has only been necessary to consider the words "in the course . . . "of theft," and not the further words "or furtherance of theft"; the consideration of the whole of those words together remains for another occasion. In these circumstances, the court is clearly of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *The Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

C. J. E.

WARNER *v.* SAMPSON AND ANOTHER.

C. A.

1958
Nov. 19, 20, 24, 25;
Dec. 18.

Lord Denning, Hodson and Ormerod L.JJ.

[1955 W. No. 1371.]

Landlord and Tenant—Forfeiture of lease—Repudiation of landlord's title—Action by landlord for possession—General denial of statement of claim in defence—No affirmative setting up of adverse title—Whether general denial creates forfeiture—Defence amended to admit landlord's title before any effective step taken by landlord to claim forfeiture—Effect of amendment.

Practice—Pleadings—Action for possession—General denial—Whether causing forfeiture of lease.

Practice—Pleadings—Amendment—Effect—Retroactive—Amendment of defence to admit landlord's title before any effective step taken by landlord to claim forfeiture—Whether amendment effective to exclude right to forfeiture.

Practice—Pleadings—General traverse—No effective distinction between denial and non-admission—General traverse putting plaintiff to proof.

On April 27, 1955, a landlord issued a writ against two defendants, suing them as the legal personal representatives of the lessee and claiming possession of the demised property—a house with an unexpired term of 40 years—on the grounds of non-payment of rent and breaches of covenant contained in the lease. The statement of claim, inter alia, referred to the lease, set out the title of the landlord (which was a derivative title) and specified the breaches of covenant alleged. On May 27, 1955, judgment in default of appearance was entered against the first defendant. On June 14 the solicitors for the second defendant instructed counsel to draft a defence if only to stay the landlord's hand while efforts were made to remedy the breaches of covenants; and on June 15 a defence, signed by counsel, was delivered on behalf of the second defendant, in which she admitted that she was appointed executrix of the will of the lessee, and denied the alleged breaches of covenant. Paragraph 3 was in the common form of a general traverse as follows: "Save and except for the admission herein "contained this defendant denies each and every allegation in the "statement of claim as if the same were specifically set out and "traversed seriatim." On June 29 the landlord delivered a reply alleging that by that defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled, and thereby exercised her right, to claim forfeiture of the term. On August 26 the judgment against the first defendant was set aside, and, after an appeal by the landlord, the second defendant was given leave to amend, but not to withdraw, her defence. Thereafter a defence by the first defendant and the amended defence of the second defendant, both of which admitted the lease and the title of the landlord and contained a counterclaim asking for relief from forfeiture under section 146 of the Law of Property Act, 1925, were delivered; but the landlord, by a reply (which contained a counterclaim), claimed possession of the premises on the ground that by reason of the denial of the title in the original defence the term had become forfeit, and contended that there was no jurisdiction to grant relief from the forfeiture resulting from the pleadings:—

Held, (1) that such a general denial did not involve the affirmative setting up by the tenant of a title adverse to that of her landlord, and was accordingly insufficient to cause a forfeiture.

Per Lord Denning. The landlord's right to claim forfeiture where there had been a disclaimer by matter of record by his tenant died when the feudal system of tenure died and should not now be revived.

Doe d. *Williams and Jeffery* v. *Cooper* (1840) 1 Scott N.R. 36 applied.

Per curiam: A general traverse in a pleading, whether in the form which "denies" or in the form which "does not admit" (between which forms no effective distinction can now be drawn), does no more than put the other party to proof of the allegations denied.

MacLulich v. *MacLulich* [1920] P. 439 distinguished.

(2) (*Per* Hodson and Ormerod L.JJ.) Even if the denial in the original defence created a forfeiture, the landlord did not effectively elect to claim it, either by re-entry or by issue of a writ for possession founded on the forfeiture; for her original reply contained nothing equivalent to the issue of such a writ, and by the date of her final reply which contained a counterclaim for possession, the original defence had been amended to admit the landlord's title; and once pleadings are amended, that which stood before amendment is no longer material before the court. This pleading, albeit in an action by a landlord for possession against a tenant, is no more immutable or irrevocable than any other pleading.

Moore v. *Ullcoats Mining Co. Ltd.* [1908] 1 Ch. 575; 24 T.L.R. 54 applied.

Kisch v. *Hawes Brothers Ltd.* [1935] Ch. 102 overruled.

Decision of Ashworth J. [1958] 1 Q.B. 404; [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314 (No. 2) reversed.

APPEAL from Ashworth J.

By a lease, dated February 23, 1905, a house, No. 18, Park Avenue South, Hornsey, was let by the plaintiff's predecessors in title for a term of 99 years from June 24, 1900, at a yearly rent of £8 8s. The lease contained covenants on the part of the lessee to repair, to paint both the inside and outside of the house, to register with the lessor's solicitors any change resulting from assignment on the death of the lessee or assignee, and to keep the property adequately insured against fire. In 1931 the plaintiff's interest in the house became vested in her and at some date before the year 1947 the term became vested in Mrs.

Gertrude Annie Sampson. Mrs. Sampson died on June 23, 1949, having by her will appointed the defendants, Arthur Cecil Sampson and Esther Mary Gandy, her executors and trustees. By clause 4 of her will Mrs. Sampson bequeathed the house to her trustees upon trust to permit the first defendant to use and occupy it or to receive the rents, profits and income thereof, he being responsible for all outgoings and for repairs and for insurance, and after his death in trust for her son and daughter; by clause 5 she directed her trustees to set aside out of the estate a sum of £200 as a fund to meet out of the capital and income thereof the cost of any claim for dilapidations at or near the expiration of the lease. On February 16, 1950, the will was proved.

For a few years after Mrs. Sampson's death the rent due under the lease was paid, but no payment was made at Michaelmas, 1953 or 1954, or at Lady Day, 1954 or 1955. In January, 1955, the plaintiff served on each of the defendants notice of breaches of covenant. The second defendant, Miss Gandy, was anxious about the position and in fact interviewed the plaintiff's solicitors, but the first defendant, Sampson, would not respond to persuasion or pressure by her and others that he should perform the covenants in the lease. As a result, on April 27, 1955, the plaintiff issued a writ against the defendants, suing them as the legal personal representatives of Mrs. Sampson, and claiming possession of the house, damages and mesne profits. In her statement of claim the plaintiff referred to the lease, stated that the lessor's interest in and title to the premises were vested in her, and alleged non-payment of rent and breaches of certain of the covenants in the lease. On May 27, 1955, judgment was entered against the first defendant, Sampson, in default of appearance.

On June 14 the solicitors then acting for the second defendant, Miss Gandy, instructed counsel to draft a defence in order to stay the landlord's hand while efforts were made to induce the first defendant to do something to remedy the matter. Counsel duly drafted and signed a defence, which was delivered on June 15, 1955. That defence, by paragraph 1, admitted that the second defendant was appointed an executrix of the will, and by paragraph 2 denied that she had committed any breach of covenant. Paragraph 3 was as follows: "Save and except for "the admission herein contained this defendant denies each and "every allegation in the statement of claim as if the same were "specifically set out and traversed seriatim."

On June 29, 1955, the plaintiff delivered a reply joining issue with the second defendant on her defence, and alleging that "2. By her said defence the second defendant has disclaimed "and disputed the plaintiff's title as her landlord, and the plain-"tiff is thereby entitled to forfeit the same term created by the "said lease referred to in paragraph 2 of the statement of claim. "3. The plaintiff hereby exercises her said right to forfeit the "said term, and claims to be thereby entitled to re-enter upon "the said premises."

On August 26, 1955, an order was made by Master Grundy setting aside the judgment against the first defendant and giving leave to the second defendant to withdraw her defence. The plaintiff appealed, and on October 6 Pearson J. varied the order by giving leave to the second defendant to amend (but not to withdraw) her defence. On February 14, 1956, the defence of the first defendant and the amended defence of the second defendant were delivered, both of which defences, inter alia, admitted the lease and the title of the plaintiff and, having made certain other admissions, contained a counterclaim for relief from forfeiture under section 146 of the Law of Property Act, 1925. The plaintiff's reply, dated February 27, 1956, included a counterclaim which alleged that the second defendant by her defence delivered on June 15, 1955, had denied the plaintiff's title "whereby the said term became and is forfeited to the plaintiff "and wherefor the plaintiff claims possession of the said premises "and mesne profits from date of forfeiture."

On November 8, 1956, the plaintiff died and the proceedings were by order continued as between her administratrices and the defendants.

On the trial of the action Ashworth J. held, on December 5, 1957,[1] that the comprehensive denial in paragraph 3 of the second defendant's original defence was a denial of the landlord's title which by operation of law had effected a forfeiture, and that it could not be cured by amendment. In so deciding, the judge applied the decision of Farwell J. in *Kisch* v. *Hawes Brothers Ltd.*[2] on similar facts; and on January 13, 1958, his Lordship held,[3] on an application for relief under the Law of Property Act, 1925, section 146, that as this forfeiture arose by operation of law and not under any proviso or stipulation in the lease within the meaning of section 146, the section had no application, and the defendants were not entitled to ask for relief.

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[1] [1958] 1 Q.B. 404; [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314 (No. 2).

[2] [1935] Ch. 102.

[3] [1958] 1 Q.B. 404.

The defendants appealed.

J. H. Hames and *P. S. A. Rossdale* (neither of whom were the counsel who signed the original defence of the second defendant) for the defendants. First, there has not been a denial of title such as would cause a forfeiture, for the following necessary qualities are wanting.

(*a*) The denial must be clear and unambiguous. That is not so here; and in paragraph 2, denying the alleged breaches of covenant, there was an implicit admission that a lease existed.

(*b*) There must be a clear renunciation by the tenant of his character of tenant by setting up the title of a rival claimant or asserting a claim of ownership in himself: that is the principle stated by Tindal C.J. in *Doe* d. *Williams and Jeffery* v. *Cooper.*[4] This denial does no more than put the plaintiff to proof: *Jones* v. *Mills*[5] and R.S.C., Ord. 19, rr. 13, 14 and 17.

[LORD DENNING. I have often wondered whether, in view of rule 17, the comprehensive denial was of any use; but it has been sanctioned by long practice.]

It is put in at the end to catch anything which may have slipped through the net on specific denials of specific allegations. Here the pleader caught what he never intended to catch; but this denial is not so strong as that in *Kisch* v. *Hawes Brothers Ltd.*,[6] which set up a positive claim of possession.

The doctrine that denial of title leads to forfeiture originated in the medieval law and forms of pleading and tenure when a lord might have difficulty in proving his title to land, but there is no case, even in the old books, in which a denial per se without any setting up of an adverse title worked a forfeiture until the decision of Farwell J. in *Kisch's* case.[6]

[*Scarman*, for the landlord, referred the court to *Dicksey* v. *Spencer.*[7]]

The fact that one has to go back to 1587 shows that this branch of the law of landlord and tenant is now archaic, and even in *Dicksey* v. *Spencer*[7] there was an element of force. In *Wisbech St. Mary Parish Council* v. *Lilley*[8] Lord Evershed M.R.

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[4] (1840) 1 Scott N.R. 36, 41.

[5] (1861) 10 C.B.N.S. 788, 796.

[6] [1935] Ch. 102.

[7] (1587) Moore K.B. 211; Godbolt 105; Gouldsborough 40; Owen 81; 3 Leon. 169; 4 Leon. 3.

[8] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.

and Romer L.J.[9] said that the law on this subject is now archaic; and it was also said that a denial of title must be unequivocal and made with intention. In the present case any intention has to be inferred artificially as a matter of law. [*Doe* d. *Graves and Downe* v. *Wells* [10] was also referred to.]

The three categories of case in which a forfeiture might result from a denial of title were: (i) in a tenancy from year to year, where a plain denial relieved the landlord of the necessity of serving a notice to quit; (ii) in a tenancy for a term of years, where the denial might be (a) in pais, or (b) by documentary conduct (*Doe* d. *Ellerbrock* v. *Flynn*,[11] where the term was forfeited by a tortious act); and (iii) denial by matter of record, namely, in pleadings—but there, too, there had to be the setting up of an adverse claim.

(*c*) The denial must be made with intent to deny the landlord's title. Miss Gandy had no such intention and the landlord knew that before her defence went in.

[LORD DENNING. It would not matter what she had said beforehand if the defence were an effective denial.]

(*d*) If the denial is made by an agent on behalf of the tenant, that person must have authority, either actual or ostensible, to deny the title. Here counsel had no actual authority, and though counsel, whose immunity from claims for professional negligence goes back more than 300 years, has wide ostensible authority, it is not without limitations: *Doe* d. *Lewis* v. *Cawdor* [12] and *Smith* v. *Webster*.[13] Counsel who exceeds his authority cannot normally do great harm to his client nowadays, because the remedy of amendment is so readily available, but if the client has no remedy against counsel she ought to have one by way of amendment. In *Swinfen* v. *Lord Chelmsford* [14] Pollock C.B. said that counsel had no authority to go outside the scope of his instructions, and to do so would be collateral to his authority. *Neale* v. *Gordon Lennox* [15] shows that the court will not enforce such a pleading as this after there has been an amendment. [*Strauss* v. *Francis* [16]; *Swinfen* v. *Swinfen* [17]; *Shepherd* v. *Robinson* [18];

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[9] [1956] 1 W.L.R. 121, 124, 126.

[10] (1839) 10 Ad. & E. 427.

[11] (1834) 1 Cr.M. & R. 137, 138.

[12] (1834) 1 Cr.M. & R. 398, 400.

[13] (1876) 3 Ch.D. 49, 56.

[14] (1860) 5 H. & N. 890, 922.

[15] [1902] A.C. 465; 18 T.L.R. 791.

[16] (1866) L.R. 1 Q.B. 379, 381.

[17] (1858) 2 De G. & J. 381.

[18] [1919] 1 K.B. 474; 35 T.L.R. 220.

Lewis's v. *Lewis*[19]; *Harvey* v. *Croydon Union Rural Sanitary Authority*,[20] and *Matthews* v. *Munster*[21] were also referred to.]

(*e*) If this was a denial of title, it was made under a mistake or by a lapse—it does not matter which, for counsel must be taken to intend the consequences of his pleading; and though it is difficult to claim here that the defendant should be bound by the mistake or lapse of counsel, the court could in equity grant relief from such mistake or mispleader: *Barrow* v. *Isaacs & Son*.[22]

(*f*) A denial, to effect a forfeiture, must be made by the lessee and not by a fraction of the lessee. Here there were two executors, and the denial, if made at all, was made by one without the authority of the other. Since the Administration of Estates Act, 1925, executors hold as joint tenants on the trusts in the will, and a step taken by one only will not bind the estate: *T. M. Fairclough & Sons Ltd.* v. *Berliner*[23]; *Gill* v. *Lewis*[24]; *Leek and Moorlands Building Society* v. *Clark*.[25] Ashworth J. on this point followed the old decision in *Simpson* v. *Gutteridge*,[26] which, it is submitted, was necessarily overruled by section 2 (2) of the Act of 1925, requiring that all the executors who prove a will must now be parties to a conveyance of real estate. *In re Schär, decd.*[27]—a modern decision in which Vaisey J. held that one of several joint tenants could not make a disclaimer affecting the joint tenancy—is relied on and should be preferred to *Simpson* v. *Gutteridge*.[28]

If any of the above qualities from (*a*) to (*f*) is lacking, there has been no such denial as would effect a forfeiture, so far as Miss Gandy's unamended defence is concerned, and all the submissions apply with greater force vis-à-vis the first defendant Sampson, who has never denied the landlord's title and should be entitled to relief.

Secondly, if there has been such a denial as would cause a forfeiture, then where defendants are personal representatives the court does and will accept the defence most for the benefit of the estate, irrespective of whether it is the first or the second defence. That principle is laid down in *Midgley* v. *Midgley*.[29]

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[19] (1890) 45 Ch.D. 281.

[20] (1883) 26 Ch.D. 249.

[21] (1887) 20 Q.B.D. 141; 4 T.L.R. 102.

[22] [1891] 1 Q.B. 417; 7 T.L.R. 175.

[23] [1931] 1 Ch. 60; 47 T.L.R. 4.

[24] [1956] 2 Q.B. 1; [1956] 2 W.L.R. 962; [1956] 1 All E.R. 844.

[25] [1952] 2 Q.B. 788; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492.

[26] (1816) 1 Mad. 609.

[27] [1951] 1 Ch. 280; 66 T.L.R. (Pt. 2) 1131; [1950] 2 All E.R. 1069.

[28] 1 Mad. 609.

[29] [1893] 3 Ch. 282.

[*Elwell* v. *Quash*,[30] *Wood* v. *Richardson*[31] and Williams on the Law of Executors and Administrators, 13th ed. (1953), vol. 1, p. 455, were also referred to.]

Thirdly, *Kisch* v. *Hawes Brothers Ltd.*,[32] which Ashworth J. followed, should be overruled for the following reasons: (*a*) the cause of action, if any, arose after the issue of the writ, and therefore the landlord could not rely on it in that action, though he might do so in a separate action: *Eshelby* v. *Federated European Bank Ltd.*[33]; but for the defendants to succeed on this technical ground would be a Pyrrhic victory. (*b*) *Kisch's* case[34] wrongly and unnecessarily extended the archaic doctrine of forfeiture by denial of title, a doctrine which bears no relation to the modern requirements and provisions of the law of landlord and tenant. It should not apply in the limited form of denial of title in a pleading, and, if it does, the court can allow amendment to cure what was done. *Kisch's* case[34] was considered and disapproved by a majority of the five judges of the Supreme Court in Eire in *Wallace* v. *Daly & Co. Ltd.*[35] (not cited to Ashworth J.) though for differing reasons. (*c*) The main criticism of *Kisch's* case[36] is that there, as here, there was lacking the essential element of setting up an adverse title. The modern landlord suffers no damage if his title is denied. The reference to this archaic doctrine in the argument in *Barton* v. *Reed*[37] is of no authority, for the point was not decided in that case.

[LORD DENNING. I have always understood that the plea of possession such as that in *Kisch's* case[38] merely put the plaintiff to proof. Farwell J. said that as soon as the faulty defence was delivered the landlord became entitled to claim forfeiture. But the question is: When did he do so? The landlord has to elect either to re-enter or to issue a writ claiming possession. Where is there in the present case the act which amounted to that election?]

Ashworth J., following Farwell J. in *Kisch's* case,[39] held that the right to claim forfeiture arose as soon as the unamended defence was delivered. [*Philipps* v. *Philipps*[40] was also referred to.]

Fourthly, the amendment allowed by Farwell J. in *Kisch's* case[41] and by Pearson J. in the present case had the effect of

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[30] (1716) 1 Strange 20.
[31] (1840) 4 Beav. 174.
[32] [1935] Ch. 102.
[33] [1932] 1 K.B. 254.
[34] [1935] Ch. 102.
[35] [1949] I.R. 352.
[36] [1935] Ch. 102.
[37] [1932] 1 Ch. 362, 367.
[38] [1935] Ch. 102.
[39] Ibid. 107.
[40] (1878) 4 Q.B.D. 127, 136.
[41] [1935] Ch. 102.

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curing any vice there may have been in the original pleading. Actions in 1958 should be tried on the real issues between the parties. [*Cargill* v. *Bower*[42]; section 43 of the Supreme Court of Judicature (Consolidation) Act, 1925, and R.S.C., Ord. 28, r. 1, were also referred to.] No pleading can have so strong an effect as to give rise to a right which did not exist before. In *Hollis* v. *Burton*[43] Kay L.J. said that an amendment should be treated as though there had been a withdrawal of a previous admission for all purposes; and in *Sneade* v. *Wotherton Barytes and Lead Mining Co.*[44] Collins M.R. said that the writ as amended became the origin of the action. In *Wallace* v. *Daly & Co. Ltd.*,[45] though counsel agreed not to rely on the amendment, the majority of the court said that amendment would cure the vice. Leave to amend is not given if it takes away a right from the other side.

[Hodson L.J. It all turns on the question whether this right of forfeiture crystallised when the faulty defence was delivered.]

It should crystallise, if at all, at the date of issue of the writ. One of the artificial results of the decision in *Kisch's* case[46] is that it does not. The only pleading which the court can consider as crystallising such rights as the landlord may have was his first reply which contained no counterclaim.

Fifthly, if there has been a forfeiture, relief will be sought under section 146 of the Law of Property Act, 1925, but submission on that point is reserved until the court has made its decision on the main point.

L. G. Scarman Q.C. and *Christopher Gibbons* for the landlord. *Kisch* v. *Hawes Brothers Ltd.*[47] cannot be distinguished from the present case and decided that the denial of a landlord's title in a pleading is a ground for forfeiture. It is conceded that there is a distinction between a pleading which denies and one which merely puts the plaintiff to proof, and if this defence did no more than that, or if it indicated—particularly where, as here, the title is a derivative title—that the tenant was in any genuine doubt about the landlord's title, the present submission would be unsustainable. A tenant can either in pais or by record put the landlord to proof, and a denial of that kind is not such an unequivocal or deliberate claim of title in himself or another as to effect a forfeiture. That is plain from *Doe* d. *Lewis* v. *Cawdor*[48] and *Jones* v. *Mills*.[49] But a denial such as the present, particularly as it was unaccompanied by the usual counterclaim for relief, is a procedural act which has an effect on the substantive law of landlord and tenant in that it causes a forfeiture. However inconvenient it may be in 1958, the essence of the ground of forfeiture is the repudiation, renunciation or denial: compare the law relating to chattels in actions for conversion where the mere denial without physical possession of the goods has been held to be conversion: Salmond on the Law of Torts, 11th ed., Chap. 8, section 93.

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[42] (1876) 4 Ch.D. 78.

[43] [1892] 3 Ch. 226, 241.

[44] [1904] 1 K.B. 295, 297; 20 T.L.R. 183.

[45] [1949] I.R. 352.

[46] [1935] Ch. 102.

[47] Ibid.

It is conceded that, if there is ambiguity in the words or acts of the one who denies, it becomes necessary to consider intention: *Doe* d. *Ellerbrock* v. *Flynn*.[50] But intention is irrelevant where the denial is unequivocal. Ashworth J. had no doubt that, though this was the act of counsel, counsel's mind went with his act, and it is settled law that a man is responsible for the act and intention of his agent.

As to whether the act of counsel was intentional or authorised, it is submitted that in matters affecting the conduct and management of litigation counsel has complete authority which cannot be cut down or limited in any way. It is kept under control by the court's inherent jurisdiction to refuse its assistance when it is plain that counsel has exceeded his authority: *Neale* v. *Gordon Lennox*.[51] But that is not this case; nor have the cases on compromises by counsel any relevance here.

[LORD DENNING. It seems to all of us that counsel had authority to put in that plea.]

Then the defence of Miss Gandy, delivered on June 15, 1955, properly construed, was an effective claim to keep the landlord out of possession and an implied assertion that the title lay somewhere else than in the plaintiff. In the absence of a counterclaim for relief it was immaterial whether the defence "did not admit" or "denied," for nothing in her defence indicated any genuine doubt about the plaintiff's title.

[LORD DENNING. What is the effect of a traverse but a putting to proof?]

A traverse is a term of art in pleading, meaning that the allegation traversed has to be proved. In most forms of action everything can be achieved equally by "not admitting": see

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[48] 1 Cr.M. & R. 398.

[49] 10 C.B.N.S. 788.

[50] 1 Cr.M. & R. 137.

[51] [1902] A.C. 465

R.S.C., Ord. 19, r. 2. But in a defence to a landlord's claim for possession, as also in a libel action, a general traverse at the end may have unusual effects. In this case it may cause a forfeiture, and in a libel action it has been held to amount to a plea of justification. [" Traverse " in Stroud's Judicial Dictionary, 3rd ed., p. 3087, and Stephen and Pinder on Pleading, 6th ed. (1860), p. 382, were also referred to.]

[LORD DENNING referred to " traverse " in Bullen and Leake on Precedents, 3rd ed., p. 436.]

[HODSON L.J. " Traverse " includes both " denies " and " does not admit."]

Farwell J. in *Kisch's* case [52] did not draw any distinction between the words but held that the plea of possession was a denial of title. That denial in a pleading may effect a forfeiture has been recognised in the profession for many years, as is shown by the argument of Mr. Gavin Simonds in *Barton* v. *Reed.*[53] It is one of the pitfalls against which inexperienced pleaders are always warned.

The principle that a denial by matter of record is ground of forfeiture was stated in Bacon's Abridgment, 7th ed., vol. 3, pp. 196–197, under " Tenant for Life," and under " Title, Leases " and Terms for Years. When forfeited " (vol. 4, p. 884), where it was said that " to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may impair the " interest of his lessor, the lease shall be void, and the lessor " may re-enter." The reports of *Dicksey* v. *Spencer* [54] support the submission that the landlord's right crystallises when the act of denial takes place, and matters subsequent do not avail the tenant. [*Saunders* v. *Freeman* [55] was also referred to.] The circumstances in which he to whom the reversion belongs can re-enter are set out in *Henry Vavasor's* case,[56] where it is also said: " But otherwise where the man loses by discretion of the " court on a mispleading." See also Viner's Abridgment, 1st ed., vol. 1, p. 37, Item 14, on the phrase " if he pleads it " feintly," and Comyn's Digest of the Laws of England, 4th ed., vol. 4, on Forfeiture, A.5, on " involuntary mispleding," and the reference to Rolles' Abridgment, vol. 1, p. 853, *l.* 42, indicating that involuntary mispleading did not work a forfeiture. In *Sir William Pelham's* case [57] " involuntary mispleader " is given the meaning of an error akin to a slip or accident. But those statements do not detract from the principle of denial by matter of record effecting a forfeiture, for which there is a continuous stream of authority from the Year Books to the present day. [*Doe* d. *Bennett* v. *Long*[58] and *Oakley* v. *Lyster*[59] were also referred to.]

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[52] [1935] Ch. 102.
[53] [1932] 1 Ch. 362, 367.
[54] Moore K.B. 211.
[55] (1562) 2 Dyer 209a.
[56] (1344) Year Book 18 Edw. III, Trinity Term, p. 28, para. B, Instance 33.
[57] (1590) 1 Co.Rep. 14b; 2 Leon. 60

Secondly, if there is ground for forfeiture in a pleading, a landlord may take advantage of it in the action which contains the pleading. Though this landlord may not be able to rely on her original reply as constituting her election either to re-enter or to issue a writ for possession, her reply to the defendants' amended defence, which contained a counterclaim, was an act equivalent to the issue of a new writ and avoided multiplicity of proceedings.

[HODSON L.J. The court would surely have a discretion as to how it would treat the landlord's counterclaim.]

If the landlord's claim is well founded in law, a new writ could be issued today. The determination of this question depends on the question whether the defendants' amendment was of any use. If it was, it is as fatal to the claim for forfeiture as it is to the counterclaim for possession. [Section 39 of the Supreme Court of Judicature (Consolidation) Act, 1925; R.S.C., Ord. 19, r. 3, and Ord. 23, r. 3, and the notes on *Toke* v. *Andrews*[60] and *Renton Gibbs & Co. Ltd.* v. *Neville & Co.*[61] were referred to.]

Serjeant v. *Nash, Field & Co.*[62] shows what in modern law is necessary to effect a forfeiture. There the issue of a writ operated as a final election by the lessor. The rule recognised and the cases cited in *Moore* v. *Ullcoats Mining Co. Ltd.*[63] support Farwell J.'s decision in *Kisch's* case[64] that the landlord's reply was an unequivocal act of election on which he could rely as conduct equivalent to re-entry when an action was pending between the parties.

Thirdly, matters subsequent to the denial of title, such as amendment or even withdrawal of the original plea, cannot cure the forfeiture. Once the ground of forfeiture arises, the landlord alone can elect whether to avail himself of it or to waive it, for the original defence once delivered constituted a breach of the condition annexed by law to the lease. The fundamental question

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[58] (1841) 9 C. & P. 773.
[59] [1931] 1 K.B. 148.
[60] (1882) 8 Q.B.D. 428.
[61] [1900] 2 Q.B. 181.
[62] [1903] 2 K.B. 304; 19 T.L.R. 510.
[63] [1908] 1 Ch. 575; 24 T.L.R. 54.
[64] [1935] Ch. 102, 107.

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is: What is the ground of forfeiture? Is it that which was on the record when the matter reached trial or when the amended defence was put in? Or is it that which was on the record when the original defence was delivered?

[HODSON L.J. In the ordinary case it is the former. Do you say that in this form of action the landlord has something better than a pleading?]

Yes; for an act of record has had an effect on the substantive law of landlord and tenant.

Fourthly, the pleading of one executor can work a forfeiture. That was decided in *Simpson* v. *Gutteridge*,[65] the authority of which has never been questioned. Section 2 of the Administration of Estates Act, 1925, expressly preserved the powers and rights of executors under the old law, save to the extent that the new Act removed or modified them. That which happened in the present case was not a " disclaimer " within the definition of " conveyance " in section 55 of that Act. The view expressed by Ashworth J.[66] on this point is respectfully adopted. *In re Schär, decd.*,[67] is distinguishable.

Fifthly, *Midgley* v. *Midgley*[68] does not apply on the facts of this case and, if it has any bearing, then, in the absence of any plea from the first defendant Sampson, it is submitted that Miss Gandy's plea was the defence most favourable to the estate, for it effectively succeeded in keeping the landlord out of possession.

Sixthly, submissions on the claim for relief under section 146 of the Law of Property Act, 1925, are reserved pending judgment on the issue of forfeiture.

Hames replied, and referred to *Barker* v. *Windle*[69] and *Lucas* v. *Dixon*.[70]

Cur. adv. vult.

LORD DENNING. The detailed facts of this case are all set out by Ashworth J. in his judgment. They are contained in the Law Reports[1] and I need not repeat them now. Suffice for present purposes to say that the statement of claim recited the original lease, its covenants, and the proviso for re-entry. It alleged a derivative title in the plaintiff saying that the reversion was vested in her by " divers mesne assurances and acts in the

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[65] 1 Mad. 609.

[66] [1958] 1 Q.B. 404, 420–421.

[67] [1951] 1 Ch. 280.

[68] [1893] 3 Ch. 282.

[69] (1856) 6 E. & B. 675.

[70] (1889) 22 Q.B.D. 357.

[1] [1958] 1 Q.B. 404; [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314 (No. 2).

"law"; it then alleged a derivative title in the defendants, saying that the term became vested in Gertrude Annie Sampson, and that the defendants were her legal personal representatives. It went on to allege that the defendants had committed breaches of covenant by non-payment of rent, failure to insure, to paint, and to repair. It alleged a notice to remedy breaches and a failure to remedy. It ended with a claim for possession and mesne profits.

The defence of the second defendant admitted that she was the executrix of the will of Gertrude Annie Sampson, denied that she had committed the alleged or any breaches of covenant, and then concluded with this general denial, on which the whole case turns: "Save and except for the admission herein contained this "defendant denies each and every allegation in the statement of "claim as if the same were specifically set out and traversed "seriatim."

The judge has held that by putting in that general denial the defendant denied the plaintiff's title, and that thereupon the plaintiff was entitled to claim forfeiture of the lease. As soon as the plaintiff elected to exercise her right, as she did in her reply, the forfeiture was complete, and nothing that the defendant could do to avoid that result would avail her anything. It was incurable by amendment. No relief could be given against it. It was final and irrevocable. So the judge has decided. Yet the rent, we were told, has been paid or is ready to be paid. The repairs done, or almost done. All the breaches will be remedied. Everything made good save for this general denial which, if the judge be right, cannot be cured by art or skill. Strike it out, amend it as it now has been amended, but still the effect remains. The rest of this term, with 40 years still to run, valued at over £3,000, is forfeited to the landlord. How must the unfortunate counsel who drafted the defence reproach himself for having brought this on his client! If he had not used the word "denies" but had said "does not admit," there would, it is agreed, have been no forfeiture. But this denial brings with it an inexorable fate from which, if this decision stands, there is no escape.

Since so much effect has been given to this general denial, I would say a word about it. It is used in nearly every defence which goes out from the Temple. It comes at the end. The pleader has earlier gone through many of the allegations in the statement of claim and dealt with them. Some he has admitted. Others he has denied. Whenever he knows there is a serious contest he takes the allegation separately and denies it specifically. But when he has no instructions on a particular allegation, he covers it by a general denial of this kind, so that he can, if need be, put the plaintiff to proof of it at the trial. At one time the use of this general denial was said to be embarrassing: see *British and Colonial Land Association Ltd.* v. *Foster and Robins*,[2] but since 1893 it has been recognised as convenient and permissible: see *Adkins* v. *North Metropolitan Tramway Co.*[3] Sometimes the pleader "denies," sometimes he "does not "admit" each and every allegation; but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded "as if it were specifically set out and traversed "seriatim." In short, it is a traverse, no more and no less. Now the effect of a traverse has been known to generations of pleaders. It "casts upon the plaintiff the burden of proving the allegations "denied": see Bullen and Leake on Precedents, (3rd ed., p. 436). So this general denial does no more than put the plaintiff to proof. Mr. Scarman did suggest at one stage that it might indirectly involve a positive averment. For instance, he said that, if pleaded in a libel action, it would involve a denial that the words were false and hence it would carry the implication that they were true and would amount to a plea of justification. But he did not pursue this illustration, and I think it clearly untenable. There are some denials which do involve an affirmative allegation (see *MacLulich* v. *MacLulich*[4]); but not this general denial. It only puts the plaintiff to proof.

The effect of this general denial, in an action to recover land, is therefore the same as the classic plea: "The defendant is in "possession." This plea of possession was good against everyone except against a plaintiff who could show a better title. It put the plaintiff to proof of his title as much as if the defendant had expressly denied, or had expressly stated that he did not admit, the whole and every one of the allegations contained in the plaintiff's pleading: see *Danford* v. *McAnulty*.[5] In my junior days I often put in this plea of "possession," and I should have been shocked to find that I had thereby involved my client in a forfeiture. Yet that was the result of such a plea if a decision of Farwell J. in 1935 was right. He held, in *Kisch* v. *Hawes Brothers Ltd.*,[6] that a plea of "possession" was a cause of forfeiture on the ground that it amounted to a denial of the plaintiff's

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[2] (1888) 4 T.L.R. 574.
[3] (1893) 10 T.L.R. 173.
[4] [1920] P. 439.
[5] (1883) 8 App.Cas. 456.
[6] [1935] Ch. 102.

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title, and that a denial of the plaintiff's title was a ground on which a lessor was entitled to claim forfeiture of the lease: and that, as soon as the plaintiff delivered a reply claiming the right to re-enter on that ground, there was a forfeiture, irrevocable and incurable by amendment, and enforceable in those very proceedings, although the cause of forfeiture only arose after the date of the writ.

In the present case the judge has followed *Kisch* v. *Hawes Brothers Ltd.*,[6] as no doubt he felt he ought to do; but we have been invited to overrule it, and for this purpose we have been taken back to the old books on forfeiture by matter of record.

The history starts in feudal times. When a lord allotted a feud or fee to a tenant there was a condition annexed to it that the tenant should do service faithfully to him by whom the lands were given: for which purpose the tenant took an oath of fealty; and in case of breach of this condition and oath the lands reverted to the lord who granted them. If the tenant did anything tending to impair the title of his lord to the lands it was a breach of his oath of fealty and gave rise to a forfeiture. This is well seen by a reference to Glanville, who was Chief Justice in the reign of Henry II. In his treatise composed about 1187 A.D. he says (Book IX, Ch. 1, p. 68) that "no one can by law, consistently "with the Faith implied in Homage, do anything which tends to "deprive his Lord of his Inheritance or to affix a personal stain "upon him . . . if a tenant should do anything to the dis-"inherison of his Lord, and should be convicted of it, he and his "heirs shall for ever lose the fee held of such Lord."

Among the acts which tended to the disinherison of the lord, the most important for present purposes was a *disclaimer* by the tenant by matter of record. This was a denial by the tenant in a court of record of his lord's title. It commonly arose in this way. If a tenant failed to perform the services due to his lord, the lord used to take action to recover them. The usual thing he did was to take the tenant's cattle by way of distress so as to compel the tenant to perform the services. In order to regain the cattle, the tenant would bring replevin in the Court of Common Pleas (a court of record) and, when the lord avowed for services in arrear, the tenant would enter a disclaimer in these words: "*He doth not hold of the said Lord the land afore-"said but the same to hold of the said Lord altogether disavows "and disclaims.*" This disclaimer was a very powerful weapon in the hands of the tenant, for by it the lord was barred of all possessory remedies for the services. The result was that, although the distress and avowry of the lord were lawful, yet the tenant would regain and retain his cattle and recover damages from the lord. It tended, therefore, greatly to the prejudice of the lord. But the lord could have his revenge, provided always that he could prove his title. By bringing a writ of right on the disclaimer, he could claim forfeiture of the tenant's interest altogether. This is all explained by Finch in his Treatise on the Common Laws, pp. 268–269. He says that "The Lord shall "have a writ of right upon this disclaimer, and if he can prove "that the land is holden of him, he shall recover the land itself "for ever, *because the disclaimer is of record.*"

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[6] [1935] Ch. 102.

I have dealt thus much with disclaimer because it is the only instance I have found in the old law in which a denial on the record of the landlord's title by itself gave rise to a forfeiture. But the reasons for it are, as Blackstone says, "most apparently "feodal" (see Blackstone, Commentaries, 8th ed., vol. 2, p. 275): and when the feudal tenures died out, the law on the subject died too. Never since feudal times has a denial of title by itself given rise to a forfeiture until *Kisch* v. *Hawes Brothers Ltd.*[6] in 1935.

There are many other instances in the old books of acts which tend to the disinherison of the lord, but in all of them you will find that the tenant is acting contrary to the faith which he owes to his lord. He is not defending the reversion as he ought to do. He is claiming the fee simple to be in himself or in another, and not in the lord. If he claims it on the record of the court, it is a cause of forfeiture. Thus if a writ of right was brought against a tenant for life and he took it upon himself in his pleadings "to join the mise upon the mere right" (which means that he put it in issue who hath the best or clearest right: see Termes de la Ley, pp. 442–443), that amounted to a claim on the record that he himself was entitled to the fee simple, and on being proved it gave rise to a forfeiture: see Coke upon Littleton, vol. 2, pp. 251b, 252a. Or if the tenant allowed a stranger to recover the land by not taking the trouble to defend the case, or by making default in pleading, or by pleading "feintly," i.e., covinously in collusion with the stranger, this was a cause of forfeiture. On the contrary, if the tenant had acted in good faith towards his lord and had done nothing to allow the stranger to win but "loses by "discretion of the court on a mispleading," there was no forfeiture. This appears from a case in 1344 on a writ of entry against *Henry Vavasor.*[7] It is reported in the Year Book of 18 Edward III, No. 33 (which will be found with a translation in the official reprint published by H.M. Stationery Office, p. 366).

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[6] [1935] Ch. 102.

These rules were afterwards extended to include not only tenants for life, but also tenants for years. There are a number of cases which show that if a tenant for years, on the face of the record, claimed the freehold for himself, that was a ground on which the reversioner could forfeit the lease. The point used to arise in this way: the original lessor sold his reversion to a purchaser and assigned the property to him. The purchaser then called upon the tenant to attorn to him and to pay rent. Instead of doing so, the tenant resisted the demand and claimed for one reason or other that he was himself entitled to the freehold. If that issue was tried out and decided against the tenant, the reversioner was entitled to claim forfeiture of the lease: but in order to do so he had to bring a fresh action to recover possession: see *Plesington's* case [8] and *Saunders* v. *Freeman.*[9] In 1587 there was an exceptional case of this kind which deserves special mention. It is reported as *Dicksey* [or *Dicksee* or *Dixe*] v. *Spencer* [10] in some places and as *Barkhouse's* case [10] in another. Barkhouse let premises to Spencer for a term of years. Barkhouse afterwards sold the reversion to Dicksey. Dicksey sued Spencer for rent. Spencer pleaded that he had bought the reversion from Barkhouse before Dicksey bought it. Dicksey did not wait for the issue to be tried out but re-entered at once on the ground that by this plea the tenant Spencer had forfeited the lease. Was this re-entry lawful? The question was much debated in the various courts. It first came up in the Court of Hustings at the Guildhall, where it was referred for the opinion of the Court of Common Pleas [sub nom. *Wolstan Dixe's* case].[10] When it came before the Common Pleas, two judges at first held that there was no forfeiture,[11] but three judges later held that there was a forfeiture.[12] When it got back to the Hustings the court there refused to abide by the opinion of the three judges and held that there was no forfeiture. Dicksey thereupon brought a writ of error before the special commission of three judges which heard appeals from the Hustings. These seem to have been of opinion that there was a forfeiture, but it is reported that " after many

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[7] (1344) Year Book 18 Edw. III, Trinity Term, p. 28, para. B, Instance 33.

[8] (1393) Fitzherbert's Abridgement Title Quid Juris Clamat, 20.

[9] (1562) 1 Plowden 209; 2 Dyer 209a.

[10] (1587) Moore K.B. 211–212.

[11] (1587) Godbolt 105.

[12] (1587) Gouldsborough 40; Owen 81; 4 Leon. 3.

" arguments, the said justices moved the parties to a friendly " course, to compound the matter." [13] The issue was thus left undetermined. The case can hardly be considered as of much authority. It only shows that the judges of that time got into difficulties just as we do.

The latest case on this medieval law was in 1590, *Sir William Pelham's* case,[14] which was argued by Sir Edward Coke himself when he was counsel. He did a great deal of research and cited many cases from the Year Books. He made the results of all this learning available to the profession at large when he came to write his commentary upon Littleton. He there says (vol. 2, p. 251b) that forfeiture *by matter of record* may be made by a particular tenant by " three manner of ways. First by alienation. " Secondly, by claiming a greater estate than he ought. " Thirdly, by affirming the reversion or remainder to be in a " stranger." He gives instances of these three ways. Throughout his discourse it is plain that a disclaimer by a tenant in a court of record does not give rise to a forfeiture unless it amounts, expressly or impliedly, to an assertion or affirmance by the tenant of title in himself or in a stranger. His analysis of the law on the subject has been accepted by all who have followed him, notably Sir John Comyns C.B. in his Digest (4th ed., vol. 4), Forfeiture (A.2, A.4, A.5), and Sir William Blackstone in his Commentaries (8th ed., vol. 2, pp. 275–276). I am sure that Matthew Bacon in his Abridgment meant to say nothing to the contrary.

So ends the medieval law as to forfeiture by matter of record. Thenceforward it seems to have fallen into disuse for over 300 years. There is no case, so far as I know, in which it has been applied between *Pelham's* case [14] in 1590 and *Kisch* v. *Hawes Brothers Ltd.*[15] in 1935. There is mention of it once or twice as, for instance, in *Doe* d. *Graves and Downe* v. *Wells*,[16] where it was held that a disclaimer (not of record) does not work a forfeiture; but otherwise it has been out of sight and out of mind. It is a pity that it was not left in oblivion, for it is quite inappropriate at the present day. All the circumstances which gave rise to this medieval law have now disappeared; and with their passing the old law has gone too. A tenant for years does not owe homage to his landlord. He does not take an oath of fealty. He is under no duty to defend the interest of the reversioner. His rights and duties are defined by the lease; and there is no room for any implied condition that he is not to dispute the landlord's title, either on the record or off it. The landlord is sufficiently protected by the rule that the tenant is estopped from denying his landlord's title. This rule ensures that no denial of title is of any avail to the tenant except in those cases where he may properly put the landlord to proof. To go further and say that the denial involves a forfeiture would be a punishment on the tenant which cannot be justified. This form of pleading does the landlord no harm, and the tenant should not suffer by reason of it. When these old feudal rules are brought up to exact a penalty for an innocent plea of this kind, I call to mind the words of Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.*[17]: "When these ghosts of the past stand in "the path of justice clanking their medieval chains the proper "course for the judge is to pass through them undeterred." That spiritual advice, if I may so describe it, was given on a like occasion when it was sought to deprive a man of his rights because of his form of pleading. The House of Lords did not permit him to be trapped there by the old rules. Nor should we here. I have no hesitation in holding that a denial in a pleading of the landlord's title does not today give rise to a forfeiture. In so far as *Kisch* v. *Hawes Brothers Ltd.*[18] held that it did, it was wrong and should be overruled.

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[13] (1587) 3 Leon. 169, 170.

[14] (1590) 1 Co.Rep. 14b; 2 Leon. 60.

[15] [1935] Ch. 102.

[16] (1839) 10 Ad. & E. 427.

I would only add that, if the medieval law were to be revived, it would not, on a proper understanding of it, enable the landlord to claim forfeiture of the lease. This general denial only puts the landlord to proof. It does not affirm the fee to be in the defendant or in a stranger. If it were by some mischance to be so construed, it would be a "mispleader" which would not cause a forfeiture. Moreover, a defendant in the old days was not bound by the words of his professional pleader unless he had expressly or tacitly adopted them: see Pollock and Maitland (2nd ed., vol. 1, p. 212); and this would apply especially in a case where the pleading might give rise to a forfeiture: see Finch, Treatise on the Common Laws (p. 266). In this case again there was no re-entry or its equivalent; and in any case the plea has been amended. I do not stay, however, to consider these matters, nor any of the law relating to forfeiture by acts in pais, nor those cases where a tenant from year to year by his conduct has waived the necessity for a notice to quit. Suffice it to say that in my opinion a denial in a pleading by a tenant of his landlord's title does not today give rise to forfeiture.

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[17] [1941] A.C. 1, 29; 57 T.L.R. 13; [1940] 4 All E.R. 20.

[18] [1935] Ch. 102.

I would therefore allow this appeal and remit the case for hearing on the other issues.

Hodson L.J. This was an action for possession brought by a landlord against the two personal representatives of the lessee on the grounds of non-payment of rent and breaches of covenants contained in the lease. Judgment was entered against the first defendant in default of appearance. The second defendant entered a defence (which was subsequently amended) containing this paragraph: "Save and except for the admission "herein contained this defendant denies each and every allega-"tion in the statement of claim as if the same were specifically "set out and traversed seriatim." The defence as originally drawn contained no counterclaim for relief against forfeiture. By her reply the landlord claimed that by her defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled and thereby exercised her right to forfeit the term. The judge, applying the decision of Farwell J. in *Kisch* v. *Hawes Brothers Ltd.*,[18] gave judgment for the plaintiff, not on the grounds claimed in the writ, but on the ground of forfeiture as claimed in the reply.

This case cannot be distinguished in any way favourable to the defendants from *Kisch* v. *Hawes Brothers Ltd.*[18] There the landlord followed the course which has been taken here, namely, he took the point in reply to the defence that by their defence the defendants had denied the plaintiff's title and that a denial of the plaintiff's title by a tenant is a ground upon which a lessor is entitled to claim forfeiture of the lease.

It should be noted that in *Kisch's* case[18] the effect of the defence was derived from consideration of Order 21, rule 21, which by its then terms introduced into the pleading a statement that the defendant denies or does not admit the allegations of the statement of claim. In argument, an earlier case, *Barton* v. *Reed*,[19] was referred to, in which the point was taken, but not decided, that a defendant forfeited his lease by pleading a denial of his landlord's title. Mr. Scarman, for the plaintiff, has not sought to uphold *Kisch's* case[20] on the basis that failure to admit title creates a forfeiture, for he concedes that at least

[18] [1935] Ch. 102.

[19] [1932] 1 Ch. 362.

[20] [1935] Ch. 102.

when there is a derivative title, as there was in that case as well as in this, a defendant is entitled to put to proof or not to admit title without imperilling his lease: see *Jones* v. *Mills*[21] and *Doe* d. *Lewis* v. *Cawdor*.[22] He, however, has contended that in this case the defendant has gone beyond non-admission and the mere putting to proof by setting up a denial in clear and unambiguous terms which entitles the landlord to claim a forfeiture of the lease.

The legal principle involved goes back to feudal times and is stated as follows in Bacon's Abridgement (7th ed., vol. 3, p. 196): "Another way of forfeiture in a court of record is, "by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person "than his lord. This seems to be grounded on a rule in the "old feudal law, that if a vassal denied that he held the feud "of his lord, and it was proved against him, such denial was "a forfeiture." Examples are to be found in the books of denial by record involving the setting up of an adverse title: compare *Dicksey and Spencer's* case,[23] where the lessee for years, in an action of debt brought against him for the rent reserved, claimed fee by bargain and sale of his lessor, the which bargain and sale the plaintiff traversed. "All the three judges "were clearly of opinion that, notwithstanding the traverse, it "is a forfeiture; for the very claim is a forfeiture which "cannot be saved by matter subsequent."[23] The same case appears to be reported under the name *Barkhouse*,[24] where it is recorded: "Debt against lessee for years for rent: the defen"dant claimed fee in the land whereas he had no fee: it was "resolved that it was a forfeiture." The principle is later stated in clear language in *Doe* d. *Williams and Jeffery* v. *Cooper*.[25] Tindal C.J. said[26]: "To constitute a disclaimer, "there must be a renunciation by the party of his character of "tenant, either by setting up the title of a rival claimant, or "by asserting a claim of ownership in himself." Coltman J. in the same case said[27]: "A disclaimer I understand to be "the setting up of a title that is inconsistent with the title "of the landlord"; and he ended his judgment by saying: "I think the jury were well warranted in concluding that the "defendant had no intention to deny the right of the lessors

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[21] (1861) 10 C.B.N.S. 788.
[22] (1834) 1 Cr.M. & R. 398.
[23] 3 Leon. 169, 170.
[24] 4 Leon. 3.
[25] (1840) 1 Scott N.R. 36.
[26] Ibid. 41.
[27] Ibid. 43.

"of the plaintiff, but merely desired to secure himself from "liability to be called upon again by Kent." The other members of the court gave judgment to the same effect.

On the construction of the defence, I agree with the judge that the words of paragraph 3, which I have quoted above, are clear and specific. There is here a denial which, if today there is any validity in the distinction between denial and putting to proof, goes beyond the non-admission to be found in *Kisch's* case.[28] The question still remains whether this denial involves the affirmative setting up of an adverse title to be found in the authorities. Mr. Scarman contends that this must be so, for to deny is equivalent to the assertion of the opposite and must of necessity involve the tenant in asserting a title in himself or a stranger. While conceding that there may be cases where, as a matter of construction, a denial may in a pleading be pregnant with an affirmative allegation (compare *MacLulich* v. *MacLulich*[29]) I do not think that this is such a case. Bearing in mind that the courts lean against forfeiture, I think it is wrong to read into the general denial contained in the paragraph of the defence which I have read an affirmative allegation of the kind supposed by the judges who formed the court in *Doe* d. *Williams and Jeffery* v. *Cooper*.[30]

In my opinion at the present time, although the practice of pleaders may vary, there is no effective line to be drawn between non-admission, on the one hand, and denial on the other. Certainly a general traverse of the kind used in the defence here should not be taken against the defendant as going beyond a putting to proof and ought not to be taken to involve an affirmative contradictory allegation that the title in the land was in himself or in a stranger. Indeed, on the form of pleading it would not be legitimate for him to give evidence to that effect.

This conclusion is enough to dispose of the appeal in favour of the defendant, for, if the pleader did not destroy his client's term by his denial, there is no forfeiture. I should add that, as the judge pointed out, the pleader in question was not the counsel now engaged in the case on behalf of the defendant.

If I am wrong in saying that the defence created no forfeiture, the question remains whether the landlord has effectively elected to claim the forfeiture. I have said that the plaintiff followed the line taken in *Kisch's* case [31] by taking the point in his reply that there was a forfeiture and electing by that reply to accept the forfeiture so created.

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[28] [1935] Ch. 102.

[29] [1920] P. 439.

[30] 1 Scott N.R. 36.

Again Mr. Scarman does not seek to support *Kisch's* case [31] in this respect, for he recognises that to make his election the landlord must either re-enter or issue a writ of possession, or take some equivalent step in order to make his election, and he does not contend that the reply in its original form would have any greater effect than a notice of intention to re-enter, which would be insufficient. The position is fully stated by Warrington J. in *Moore* v. *Ullcoats Mining Co. Ltd.*[32] He said [33]: "I am of opinion upon the authorities—and I refer "particularly to *Jones* v. *Carter* [34] and to a dictum of Bayley J. "in *Fenn* v. *Smart* [35]—that where the condition in the lease "is that the landlord may re-enter he must actually re-enter, "or he must do that which is in law equivalent to re-entry, "namely, commence an action for the purpose of obtaining "possession. Parke B. in *Jones* v. *Carter* [36] puts that quite "plainly. In the particular case to which he was referring the "proviso for re-entry was in a different form to that in the "present case—a form which one sometimes finds, namely, "that upon breach the lease shall be determined. What he "says is this: 'An entry, or ejectment, in which an entry is "'admitted'—that is, having reference to the old form of procedure—'would be necessary in the case of a freehold lease, "'or of a chattel interest, where the terms of the lease "'provided that it should be avoided by re-entry. Whether "'any other act unequivocally indicating the intention of the "'lessor would be sufficient to determine this lease'—that is, "the lease in the form of one with which he was dealing— "'which is made *void* at the option of the lessor, we need "'not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant "'admitted an entry, and the entry would certainly be an "'exercise of the option.' In *Fenn* v. *Smart* [37] Bayley J.— "although it is only a dictum in the course of the argument, "but it shows the view he took—said: 'Must not the necessity "'of an entry depend upon the wording of the condition? If "'the words be, that upon the doing of such an act, the "'reversioner may enter, there must be an entry to avoid the

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[31] [1935] Ch. 102.
[32] [1908] 1 Ch. 575; 24 T.L.R. 54.
[33] [1908] 1 Ch. 575, 587.
[34] (1846) 15 M. & W. 718, 725.
[35] (1810) 12 East 444, 448.
[36] 15 M. & W. 718, 725.
[37] 12 East 444, 448.

"'estate; but if the estate be granted upon condition that if "'the grantee do such an act, the estate shall thereupon im"'mediately cease and determine, there no entry is necessary.' "He there draws a distinction between the two classes of cases. "In my opinion the present case falls within the first class, "and I do not see how it is possible, on any construction of "this proviso for re-entry, to say that the lessors have re-entered, "when all that they have done is to give a notice of their in"tention to re-enter, founded on a statement that the lease had "determined, which had not in fact happened, or a demand for "possession founded on that notice." The plaintiff not having re-entered or issued a writ of possession founded on the forfeiture relied on was not in a position to obtain judgment for possession in that action.

Mr. Scarman has argued, however, that in this case the plaintiff has, although she has not issued a writ of possession, done the equivalent in her reply to the amended defence which, since it contained a counterclaim, entitled her by way of counterclaim to the counterclaim to raise the question to save multiplicity of actions. I am not persuaded that as a matter of procedure this step is effective; but the point is of little more than academic interest since, if Mr. Scarman is right, the landlord can still claim the forfeiture by issuing a writ of possession if the defendant has by her plea given rise to a forfeiture. There is, however, I think in this case a fatal objection to the plaintiff's claim since, as in *Kisch's* case,[38] the defence was amended before trial, so that the denial of title was struck out and the action came to trial without it. Moreover, the defence was amended before the reply claiming forfeiture, on which the plaintiff now relies, came into existence. I do not think that this amendment can be ignored. Once pleadings are amended. what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order; and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties: see *Sneade* v. *Wotherton Barytes and Lead Mining Co.*,[39] where Lord Collins M.R. said[40]: "It appears to

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[38] [1935] Ch. 102.

[39] [1904] 1 K.B. 295; 20 T.L.R. 183.

[40] [1904] 1 K.B. 295, 297.

"me that the writ as amended becomes for this purpose the "original commencement of the action."

A somewhat similar situation arose in *Wallace* v. *Daly & Co. Ltd.*,[41] a case decided by the Supreme Court of Ireland, to which we were referred. Two members of the court, who formed part of a majority in a court of five, were of this opinion, although counsel had by agreement abstained from taking the point that the forfeiture had been cured by amendment. To this Mr. Scarman replies that, although the position as to amendment is, generally speaking, as I have stated it, yet here the pleading as originally drawn had an irrevocable effect which could not be cured by amendment, since it was a breach of the condition under which the defendant held his lease. He relied on the position as stated in Bacon's Abridgment (7th ed., vol. 4, at p. 884): "Here it is to be observed, that any act of the lessee, by which "he disaffirms or impugns the title of his lessor, occasions a "forfeiture of the lease. For to every lease the law tacitly "annexeth a condition, that if the lessee do any thing that may "impair the interest of his lessor, the lease shall be void, and "the lessor may re-enter. Indeed, every such act necessarily "determines the relation of landlord and tenant; since to claim "under another and at the same time to contravert his title, to "hold under a lease, and at the same time to destroy the interest "out of which the lease ariseth, would be the most palpable in-"consistency." It is said that, the condition having been broken, this cannot be cured by amendment, even though the breach of condition is contained in a pleading which normally is capable of amendment. I cannot accept that this pleading should be regarded as any more immutable than any other pleading, and, accordingly, if it were necessary, would hold that the appeal should succeed on the ground that before the landlord had re-entered or taken effective proceedings for re-entry the defendant by amending his defence had removed from it the denial of title which it had previously contained.

The position as to *Kisch* v. *Hawes Brothers Ltd.*[42] seems to be as follows: The decision itself cannot be supported since (1) there was no denial of the landlord's title; (2) there was no election by the landlord to take advantage of the forfeiture in the manner required by law; (3) judgment was delivered against the tenant although leave had been given to amend the pleading so as to remove that part which was said to have caused the forfeiture. The landlord cannot succeed independently of *Kisch* v. *Hawes Brothers Ltd.*,[42] since (1) the mere denial of title in the defence is insufficient to cause a forfeiture; (2) by her amended counterclaim in the action the landlord has not effectively taken advantage of the forfeiture; (3) the defence was amended before the judgment was given so as to remove in this case also the part of the pleading which was said to have caused the forfeiture.

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[41] [1949] I.R. 352.

[42] [1935] Ch. 102.

I would allow the appeal and remit the case for hearing on the other issues raised in the action.

ORMEROD L.J. The fundamental question in this appeal is whether the landlord can regard the general traverse contained in the defence of Miss Gandy as a disclaimer of her title so as to be entitled to re-enter the premises.

Mr. Scarman, on behalf of the landlord, agreed that the insertion of the paragraph in question was a lapse on the part of counsel. Nevertheless, the landlord has sought to take advantage of this lapse, which, of course, she is entitled to do, whatever be the merits of the case, if there has been such a disclaimer of the landlord's title as to entitle her to claim forfeiture of the lease. As has been pointed out in the judgments which have already been delivered, the rule that the setting up of a title adverse to that of the lessor may involve the lessee in the forfeiture of his lease has its origin in the old feudal law. The question has been considered recently by this court in *Wisbech St. Mary Parish Council* v. *Lilley*,[43] when Lord Evershed M.R.[44] cited a passage from the judgment of Lord Lyndhurst C.B. in *Doe* d. *Ellerbrock* v. *Flynn*[45] as follows: "I think that the jury, upon the facts "proved at the trial, came to a right conclusion. If the tenant "sets up a title hostile to that of his landlord, it is a forfeiture "of his term: and it is the same if he assists another person to "set up such a claim. Whether he does the act himself, or only "colludes with another to do it, it is equally a forfeiture." Lord Evershed M.R. then went on to say[46]: "Of course, the conception "tion of the relation of landlord and tenant has undergone many "changes since that case was decided in 1834. The rule asserted "was founded upon the feudal law, as counsel in the case pointed "out. Still, if the facts were strictly brought within the scope "of the decision in *Doe* d. *Ellerbrock* v. *Flynn*[47] I do not doubt

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[42] [1935] Ch. 102.

[43] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.

[44] [1956] 1 W.L.R. 121, 124.

[45] (1834) 1 Cr.M. & R. 137.

[46] [1956] 1 W.L.R. 121, 124.

[47] 1 Cr.M. & R. 137.

"that even today the court would follow it." Romer L.J. said [48]: "I accept Mr. Bridges' submission that even now, if a "tenant does in fact deliberately assert a title in himself adverse "to his landlord, or if he lets a stranger into possession with the "intention of enabling him to set up a title adverse to the land"lord, then that amounts to a repudiation of the landlord's "title."

We were referred to numerous authorities, many of them very old, but it seemed to me that *Doe* d. *Williams and Jeffery* v. *Cooper* [49] stated the position clearly, when Tindal C.J. said [50]: "To constitute a disclaimer, there must be a renunciation by the "party of his character of tenant, either by setting up the title "of a rival claimant, or by asserting a claim of ownership in "himself." Did the defendants, by reason of the general traverse contained in the defence of one of them, renounce their character as tenant by setting up the title of a rival claimant, or asserting a claim of ownership in themselves or one of them? The statement of claim set out the landlord's title to the reversion. The title was a derivative one. This averment of title was therefore one of the matters which was dealt with in the general traverse, since there was no other mention of it in the defence. It was argued on behalf of the defendants that the effect of the traverse was to do no more than to put the landlord to proof of her title. For the landlord it was argued that it went much further than that. If the words in the paragraph, instead of being a denial, had read: "This defendant does not admit," and so on, then, says the landlord, there would have been no cause for complaint, but in fact there was a denial of the landlord's title, and that amounts to a disclaimer. I am bound to say that for my part I cannot accept this contention. The methods of pleaders vary, but the use of a general traverse in one form or another is very common indeed. Some pleaders, if they wish to go no further than to put the plaintiff to the proof of the matters averred in the statement of claim, will use the form "The defendants do not admit." Others will say: "The defendants deny." Having regard to the modern practice of pleaders, I have always regarded the two forms as having a similar effect, and, indeed, it is difficult to see what other effect in the ordinary case a denial could have than putting the plaintiff to proof, unless the defence also contained some positive averments. If this be the effect of a general traverse such as the one under consideration here—and for my part I think it is—then the pleading cannot amount to a renunciation by the defendants of their character as tenant.

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[48] [1956] 1 W.L.R. 121, 126.

[49] 1 Scott N.R. 36.

[50] Ibid. 41.

The judge [Ashworth J.] clearly considered that he should follow the decision of Farwell J. in *Kisch* v. *Hawes Brothers Ltd.*,[51] and he said[52]: "In my judgment, the denial of the "lessor's title contained in paragraph 3 is in clearer and more "direct form than the denial held in *Kisch* v. *Hawes Brothers* "*Ltd.*[53] to be involved in the plea that the defendants were in "possession." It was pleaded in the defence in that case, where the defendants were being sued for possession of some premises in Notting Hill Gate, that the defendants were in possession of the premises. By Order 21, r. 21, in its then form, it was provided as follows: "No defendant in an action for the recovery of land who "is in possession by himself or his tenant need plead his title, "unless his defence depends upon an equitable estate or right, "or he claims relief upon any equitable ground against any right "or title asserted by the plaintiff. But, except in the cases "hereinbefore mentioned, it shall be sufficient to state by way "of defence that he is so in possession, and it shall be taken to "be implied in such statement that he denies, or does not admit, "the allegations of fact contained in the plaintiff's statement of "claim. He may nevertheless rely upon any ground of defence "which he can prove except as hereinbefore mentioned." The plaintiff submitted that she was entitled to re-enter on the ground that the said plea amounted to a denial of the plaintiff's title, and that a denial of the plaintiff's title by a tenant was a ground for forfeiture of the lease. Farwell J. accepted this contention and held that the plaintiff was entitled to possession of the property. It follows from what I have said above that, in my view, this decision cannot be regarded as good law. The plea that the defendant was in possession of the premises did nothing more than put the plaintiff to proof of her title. It made no attempt to set up an adverse title either in the defendant himself or in anyone else. It would, indeed, cause great hardship to lessees if a plea such as the one we are considering in this case were to render a lease liable to forfeiture. Such a plea cannot do the landlord any harm, nor can it put him in any worse position than he was in before. He is simply put to the proof of his title.

But even if the true construction of the paragraph of the defence in question should be that it does amount to a renunciation by the defendants of their character as tenants, the landlord would still, in my judgment, not be entitled to succeed. The statement of claim was delivered with the writ which was issued on April 27, 1955. The first defendant, Sampson, allowed judgment to go by default, but the defence of the second defendant, Miss Gandy, was delivered on June 15, 1955. The landlord delivered her reply on June 29, 1955, paragraph 3 of which was as follows: "The plaintiff hereby exercises her said right to "forfeit the said term, and claims to be thereby entitled to "re-enter upon the said premises." Nothing was done at that time to complete the re-entry, and Mr. Scarman agreed that the paragraph in the reply without the issue of a writ would be insufficient for the purpose. The judgment obtained against Sampson was ultimately set aside, and on February 14, 1956, an amended defence was delivered on behalf of Miss Gandy, admitting the lease and the landlord's title, and counterclaiming for relief against forfeiture; and on February 27, 1956, the landlord delivered a reply claiming possession of the premises on the ground that by reason of the denial of the title in the original defence the term had become forfeited. Mr. Scarman argued that the landlord acquired the right to forfeit when the defence was delivered in its original form, and no amount of amendment could deprive her of that right. This is a proposition that I find some difficulty in following. The defence in question is a pleading which is capable of amendment like any other pleading. Once it is amended, it takes its place on the record as a part of the pleadings setting out the issues upon which the action will be tried. When the amended defence was delivered, nothing had been done by the landlord to claim possession of the premises. Had a writ claiming possession been issued before the amendment the position might have been different. This was not done, and when a claim was made the position on the record was that the landlord's title was admitted. I agree that the appeal should be allowed.

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[51] [1935] Ch. 102.

[52] [1958] 1 Q.B. 404, 416.

[53] [1935] Ch. 102.

Appeal allowed.
Case remitted for further hearing to Ashworth J.

Solicitors: *Wilders & Sorrell* (for the defendants: they were not the solicitors instructing counsel who signed the original defence of the second defendant); *Murray, Hutchins & Co.*

M. M. H.

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

1958
Dec. 1, 2.

Diplock J.

Revenue—Income tax—Penalty—"Treble the tax which . . . ought to "be charged"—Bank interest misstated in income tax return—Additional assessment made—Claim for penalties—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 25 (3).

The defendant, in making a return of income for the year ending April, 1952, stated that interest from his Post Office Savings Bank account amounted to £18 6s., and was assessed for tax accordingly. In fact the interest was £51 5s. 9d., and when that was discovered an additional first assessment was made on the defendant for the amount understated, the tax on which was £14 5s. Subsequently, the Inland Revenue Commissioners, by writ dated June 13, 1956, claimed £438 14s. 6d. for penalties, being triple the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20, under section 25 (3) of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver . . . a true "and correct . . . return which he is required under the preceding "provisions of this chapter to deliver shall—(*a*) if proceeded "against by action in any court, forfeit the sum of £20 and treble "the tax which he ought to be charged under this Act; . . . ":—

Held, that the words "tax which he ought to be charged," in section 25 (3), meant "the amount of the charge which ought to "have been made" (as expressed in section 48 of the Act of 1952), and the point of time for ascertaining that was at the date when proceedings were brought; accordingly, as at the date of the writ the defendant had been charged with all the tax for which he was liable, the only amount recoverable was the penalty of £20.

Attorney-General v. *Till* [1909] 1 K.B. 694; 25 T.L.R. 342; [1910] A.C. 50; 26 T.L.R. 134 considered.

ACTION.

On April 19, 1952, the defendant, Albert Edwin Hinchy, filled up a form prepared for the purpose by the direction of the Inland Revenue Commissioners containing a return of income and claim for allowances for the income tax year 1952/53 in which he stated the interest on accounts and deposits in banks, including post office and other savings banks, was £18 6s. His liability for tax was assessed accordingly at £125 6s. 6d. in respect of his total income. In fact the interest from his Post Office Savings Bank account for that year was £51 5s. 9d. The matter was subsequently discovered by the Inland Revenue and on November 30, 1955, an additional first assessment was made on the defendant for the amount understated, the tax on which was £14 5s.

On June 13, 1956, by a specially indorsed writ, the Inland Revenue Commissioners claimed a penalty in the amount of

£438 14s. 6d., under section 25 (3) of the Income Tax Act, 1952,[1] being three times the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20. On October 8, 1956, Master Diamond in Chambers ordered that the defendant be at liberty to defend the action.

Alan Orr for the commissioners. The penalty for which the defendant is liable depends on the construction of section 25 (3) of the Income Tax Act, 1952. Master Diamond, in granting the defendant leave to defend, held that there was a triable issue, namely, whether the penalty was three times the amount of the tax avoided or three times the amount of all the tax due. Two things are clear about section 25: first, fraud does not have to be proved (and it is not alleged in the present case), and, secondly, the penalty is a fixed one. The Crown's contention is that the words of section 25 (3) denote the total tax chargeable by direct assessment on the defendant.

An argument in favour of the defendant might be based on section 48 of the Act of 1952, which deals with cases of fraud and the proviso to which limits the penalty to three times the difference, but if the legislature thought it necessary to follow the words "treble the amount of the charge which ought to have been made "upon him" with the proviso, it must have been because they thought that the words referred to the whole of the tax payable, otherwise the proviso would be unnecessary. In *Attorney-General* v. *Till*[2] the Court of Appeal said that if the penalty was three times the amount of tax due where the taxpayer had made a mistake, yet only three times the difference where the taxpayer acted fraudulently, it was unthinkable. The House of Lords[3] reversed the Court of Appeal's decision but did not seem to dispute that the penalty was three times the whole of the tax chargeable. Rowlatt J. in *Attorney-General* v. *Johnstone* [4] clearly indicated his view on the penalties, for the amount of tax avoided in that case was about £2,000, whereas Rowlatt J. said [5]: "The "penalties he was liable to were many times £1,000—many "times." The two textbooks on income tax law express conflicting views as to the meaning of section 25 (3). Simon's Income Tax, 2nd ed., vol. 1, p. 290, para. 417, states: "Where "a penalty is imposed of treble the tax chargeable in respect of "all sources of income, the calculation is based on the duty of "the whole income for the year in question, including income "taxed by deduction. Where a section specifies treble the tax "which a person ought to be charged under the Act, only the "whole duty chargeable by direct assessment is taken as the "basis of the calculation." That is a view in favour of the commissioners. A view in the defendant's favour is expressed in Konstam's Income Tax, 12th ed., para. 383: "For neglect or "refusal to deliver a true and correct return . . . the penalty, "where proceedings are taken before any court, is £20 together "with 'treble the tax which he ought to be charged under this "'Act,' . . . : this means presumably treble the tax which he "ought to be charged in respect of the source of income that "should have been correctly included in the return." The footnote to that sentence states: "Contrast the language of "Schedule 6, paragraph 4." It is submitted that an erroneous conclusion has been drawn from paragraph 4 of Schedule 6, the wording of which is designed, inasmuch as it covers tax not directly assessable, to impose a heavier penalty than section 25 (3).

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[1] Income Tax Act, 1952, s. 25: ". . . (3) A person who neglects or "refuses to deliver, within the time "limited in any notice served on him, "or wilfully makes delay in delivering, "a true and correct list, declaration, "statement or return which he is "required under the preceding provi- "sions of this chapter to deliver shall "—(*a*) if proceeded against by action "in any court, forfeit the sum of "£20 and treble the tax which he "ought to be charged under this Act; "or (*b*) if proceeded against before "the General Commissioners, forfeit "a sum not exceeding £20 and treble "the tax which he ought to be "charged under this Act, and where "he is proceeded against before the "General Commissioners, the penalty "shall be recovered in the same "manner as any other penalty under "this Act, and the increased tax shall "be added to the assessment. (4) The "commissioners shall also proceed to "assess or cause to be assessed every "such person who makes default as "aforesaid. . . ."

[2] [1909] 1 K.B. 694; 25 T.L.R. 342.

[3] [1910] A.C. 50; 26 T.L.R. 134.

To summarise the arguments for the commissioners: first, the ordinary and natural meaning of section 25 (3) is that the penalty is treble the whole of the tax directly chargeable on the defendant for the year. If it had been desired to limit it to the tax avoided, it would have been easy to do so by similar words to those in section 48 dealing with fraud. Secondly, reliance is placed on *Attorney-General* v. *Till* [6] and *Attorney-General* v. *Johnstone*.[7] The parts of the reasoning in *Till's* case in the Court of Appeal [8] which were not disapproved in the House of Lords [9] are in favour of the commissioners. Thirdly, when the legislature enacted the Income Tax Acts of 1918 and 1952 they had notice of the view taken by the Court of Appeal and, had it been desired as a result of that view to limit the section, the appropriate words would have been added. Finally, it is apparent that section 25 imposes a penalty for a large variety of acts or omissions. That emphasises the point made by Lord Shaw in *Till's* case[10]—that one cannot read into income tax law a careful gradation according to culpability. [Reference was also made to *Inland Revenue Commissioners* v. *Elcock*.[11]]

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[4] (1926) 10 T.C. 758.

[5] Ibid. 764.

[6] [1910] A.C. 50.

[7] 10 T.C. 758.

[8] [1909] 1 K.B. 694.

[9] [1910] A.C. 50.

The defendant, who appeared in person, made no submissions on the law.

DIPLOCK J. This is an action commenced by writ dated June 13, 1956, brought by the Inland Revenue Commissioners against the defendant for penalties under section 25 (3) of the Income Tax Act, 1952. The circumstances are simple, but the consequences of those circumstances, since they depend upon the construction of a particularly difficult Act, are less simple than the circumstances themselves.

On April 19, 1952, the defendant, like many other people, filled up a form prepared for the purpose by the direction of the Inland Revenue Commissioners containing a return of income and claim for allowances for the income tax year 1952. In that return he set out the figure of £18 6s. as the interest on accounts and deposits in banks, including post office and other savings banks. In truth and in fact the amount of his income from that source with the Post Office Savings Bank during the year of return, the year to be taken into account for the purposes of assessment, namely, that ending April 5, 1952, was £51 5s. 9d., so that he had understated the amount of his interest by the difference between those two sums.

The explanation that he has given for doing so does not very much matter, except to say that he must have known that the figure which he gave was wrong if he had given any thought to the matter. His explanation was that he had intended to put the money into savings certificates or other tax-free investments. However, he was wrong, and as a result when this matter was discovered, as discovered it was because of the requirement in section 29 of the Income Tax Act, 1952, that banks, including the Post Office Savings Bank, must make returns, when so required by the inspector of taxes, to the Inland Revenue Commissioners of the amount of interest which they have credited to customers, on November 30, 1955, an additional first assessment was made upon the defendant for the amount understated, the total tax on which was £14 5s. I may add, although I do not think the date is in fact relevant, that on March 9, 1956, an assessment was made on him under Schedule E. Schedule E being dealt with as "pay as you earn," an assessment under Schedule E is not made unless the taxpayer himself requires it.

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[10] [1910] A.C. 50, 71.

[11] (1953) 35 T.C. 27.

However, the position at the date of the issue of the writ on June 13, 1956, was that assessments had been made upon the defendant in respect of all the tax to which he was liable for the tax year 1952/53. Those being the relevant facts, the Inland Revenue in this case claimed a penalty in the amount of £438 14s. 6d., that amount being three times the total amount of tax payable by the defendant in respect of the tax year 1952/53, plus £20, not, it is to be noted, three times the tax on the amount which he had understated.

The basis of that claim by the Inland Revenue is section 25 (3) of the Income Tax Act, 1952. That is the subsection which I have to construe. I find it a very difficult subsection, and I gather that I am not the only one to have done so, because in two of what I understand are the standard textbooks on income tax, Simon's Income Tax, 2nd ed., vol. 1, p. 290, para. 417, and Konstam's Income Tax, 12th ed., para. 383, in the current editions, diametrically opposed views are expressed as to the meaning of this subsection so far as quantum of penalties is concerned. Since I am faced with a difficult subsection to construe, it would have been of great assistance to me if I had had the point argued by counsel on each side. The defendant has appeared in person, and consequently I have had to rely on Mr. Orr, who appeared for the Inland Revenue, to give me such assistance as he can on the construction of this difficult Act.

I now turn to the Act. Section 19, with which I must start, provides: "Every individual, when required so to do by a notice "given to him by the surveyor, shall, within the time limited "by the notice, prepare and deliver to the surveyor a true and "correct return in the prescribed form of all the sources of his "income and of the amount derived from each source for the "year preceding the year of assessment, computed in accordance "with the provisions of this Act except that the computation of "income shall be made by reference to the year preceding the "year of assessment and not by reference to any other year or "period: . . ."

Then there is a proviso relating to surtax, liability for which the defendant was fortunately absolved. What is required therefore is a true and correct return of all the sources of income and of the amount derived from each source for the year preceding the year of assessment. In point of fact and as a matter of practice subsection (6) of section 25 applies in the defendant's case, as in most cases. Section 19 deals with a notice given by the surveyor requiring a person to make the return. Section 25 (6) provides: "If a person delivers to any surveyor a list, declaration or statement on a form prepared for the purpose by direction of the Commissioners of Inland Revenue, he shall be deemed for the purposes of this section to have been required by a notice under the preceding provisions of this chapter"—that is, section 19—"to prepare and deliver that list, declaration or statement, and the time limited for the delivery thereof shall be deemed for the purposes of this section to have expired on the date of its delivery to the said surveyor."

The form which the defendant filled in was the form prepared for the purpose by direction of the Inland Revenue Commissioners. Section 25 (3), on which the point in this case turns, is in the following terms: "A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this chapter to deliver shall—(*a*) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; . . ." I pause there to note that is a fixed penalty. The court, if action is brought in court, can award only that penalty, not less. Then it goes on: "(*b*)," which in contrast deals with a maximum penalty, "if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

Mr. Orr contends that those words "the tax which he ought to be charged under this Act" mean the total amount payable by the person chargeable for the year of assessment, and the claim in this case is made on this basis. If Mr. Orr is right, it means that if a person with an income of a profession or trade or otherwise which renders him liable to tax and surtax of £20,000 in the year, by mistake understates by £1 or less the amount of his income from one source, or if he gives the amount correctly but misdescribes the source, or indeed if he overstates his income by any amount however large or small, he is liable to a penalty of £60,020. I suppose also, Mr. Orr indeed concedes this, having regard to section 30 of the Act, that he is liable to the like penalty if he makes a mistake in the list of his employees which he is required to make under section 27 of the Act.

It is right that in considering that consequence of the construction for which Mr. Orr argues, one should bear in mind the provisions of section 55 of the Act, which excuse a person from penalties if he remedies timeously his default. It provides by subsection (1) that: "A person who has delivered a statement "or schedule and discovers any omission or wrong statement "therein may deliver an additional statement or schedule rectifying the same, and shall not thereafter be liable to any proceeding by reason of his omission or wrong statement." Subsection (2) provides similarly in respect of non-delivery of a statement; subsection (3) provides that if proceedings have already been started before the General Commissioners, and it is proved to their satisfaction that no fraud or evasion is intended, they may, but not must, stay the proceedings, and, where proceedings have been commenced in a court in the case of a certificate to the like effect from the commissioners, the court may also stay the proceedings.

Apart from that relief, which may be available in appropriate cases, the consequences which I have indicated follow—follow I think inescapably—from the construction for which Mr. Orr has contended. If that is what Parliament meant by the subsection I must of course apply it, but the consequences seem to me to be absurd and unjust, and if there is some other possible construction consistent with the words which leads to results less absurd and unjust, I should be inclined, and I think rightly inclined, to adopt it.

I think there is an alternative construction. As Lord Dunedin pointed out in *Whitney* v. *Commissioners of Inland Revenue*,[1] there are three stages in the imposition and collection of tax: stage 1, a general declaration of the liability of the subject, which is made by section 1 of the Income Tax Act, 1952, and the appropriate section in the Annual Finance Act; stage 2, quantification of that liability by means of assessment by the commissioners in accordance with the provisions of the Act, and stage 3, the recovery of the tax. While the phraseology of the Income Tax Act, 1952, is by no means uniform, Part II appears to use the expression "chargeable" in relation to persons, property and profits and during the first stage, that is to say before the liability has been quantified by assessment. It appears to treat tax as having been "charged" on the person assessed when, and only when, the assessment has been made.

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[1] [1926] A.C. 37, 52; 42 T.L.R. 58.

Section 25 (3) imposes a liability of treble the tax which he, that is the person proceeded against, "ought to be charged under "this Act," an expression which, having regard to the terms of section 148, means, in relation to Schedule D, the tax which ought to be charged upon him. It is to be noted that the expression is "ought to be charged," not "ought to have been charged." It seems to me that a reasonable meaning of the expression is the tax to which he ought to be charged, that is to say duly assessed, but to which he has not been charged or duly assessed by reason of the default. That is to say the increased tax which, when one looks at the latter part of the subsection, is to be added to the assessment. Subsection (4) appears to me to support this construction. It reads as follows: "The commissioners shall also"—a significant word—"proceed to assess or cause to be assessed every such "person who makes default as aforesaid," that is to say they shall charge on him the tax which ought to be charged. This seems to me to assume that the result of the default has been a failure to assess, as also seems to be implicit in the use of the expression "increased tax," which in subsection (3) is said shall be added to the assessment. The assessment to which the commissioners must proceed under subsection (4) where, as in this case, there has already been a first assessment, will take the form of an additional first assessment under section 41 (1) (ii) where it is to be observed a similar expression is used, for it is provided that "the Additional Commissioners shall make an assessment on "the person chargeable, in an additional first assessment, in "such a sum as, according to their judgment, ought to be "charged . . ." Such an assessment is an assessment of the additional tax to which he ought to be duly assessed but has not been by reason of the default.

The phraseology of section 25 (3) is to be contrasted with that of section 48, which deals with the penalties which can be exacted in cases of fraud. It reads as follows: "(1) Where a person who "ought to be charged with tax, as directed by this Act, is not "duly assessed and charged by reason that he has," then there are four kinds of fraudulent conduct set out, " such person shall, " on proof thereof to the General Commissioners for the division " in which he has been charged, or, if he has not been charged, " then for any division in which he is chargeable, be assessed " and charged treble the amount of the charge which ought to " have been made upon him: Provided that, if any charge has " been made, but that charge is less than the charge which " ought to have been made, such person shall be assessed and " charged, over and above the former charge, treble the amount " of the difference between the charge which was made and the " charge which ought to have been made, such amount to be " added to the assessment. . . ."

I draw attention to the use of the past tense: " the amount " of the charge which ought to have been made " in section 48 as contrasted with the use of the present tense: " the tax which " he ought to be charged under this Act " in section 25 (3). Section 48 seems to me to express in clearer and lengthier language what is intended to be conveyed by the elliptical expression in section 25 (3), " the tax which he ought to be charged."

This construction of the subsection leads to the difficulty in determining at what point of time one must ascertain the amount of tax which he ought to be charged. The answer must, I think, be the date at which the proceedings, whether before the court or the General Commissioners, are brought. I am supported in this view by the provisions of section 55, to which I have already referred, which prohibit proceedings being brought if the matter has been remedied before the proceedings are started, but if proceedings are started before the matter has been remedied, leaves it to the discretion of the General Commissioners or the court as the case may be, as to whether the proceedings are then stayed.

In the present case, the proceedings were started on June 13, after the defendant had been charged with all the tax for which he was liable. There was therefore at the date of the proceedings no tax remaining on which he ought to be charged under the Act, nor was there any increased tax which could be added to the assessment had proceedings been brought before the General Commissioners instead of before the court. On the construction of the subsection which I have indicated appeals to me, the only amount recoverable under the subsection in this case would be the fixed penalty of £20.

Is there any authority which prevents me from adopting the construction which I have indicated is the one which I think is the better construction of this difficult subsection? Mr. Orr has referred me to the report of *Attorney-General* v. *Till* in the Court of Appeal [2] and in the House of Lords.[3] That was a case brought under section 55, the corresponding section of the Income Tax Act, 1842. The relevant distinction between that section and section 25 (3) of the Act of 1952 is that the words are in this form: " . . . if any person who ought by this Act to deliver any "list, declaration, or statement as aforesaid shall refuse or "neglect so to do within the time limited in such notice, . . ." then he shall be liable to a penalty of £50 if prosecuted in any of Her Majesty's courts, and before the commissioners, "forfeit any "sum not exceeding £20, and treble the duty at which such "person ought to be charged by virtue of this Act . . ." Therefore, so far as the penalty before the commissioners is concerned, they were substantially in the same terms as under the present Act, the other difference between the two Acts being that instead of there being an express reference to a true and correct return, there are the words "as aforesaid." In the Court of Appeal the view was taken by their Lordships that the words "as aforesaid" should not be construed as referring to a true and correct return, that is to say, as introducing the words "true "and correct" before "list, declaration or statement." The reasoning which appealed to the Court of Appeal in coming to that conclusion was an examination of the consequences which would follow if the section applied to cases where there had been an error, however slight or however innocent, in a return. For that reason the Court of Appeal came to the conclusion that on the true construction of section 55, the words "as aforesaid" did not introduce into the section the qualification "true and "correct."

The decision was reversed by the House of Lords, but as Mr. Orr has pointed out, two of the members of the Court of Appeal, Cozens-Hardy M.R. and Fletcher Moulton L.J., did express the view that the penalty exactable before the commissioners expressed in the terms "treble the duty at which such person "ought to be charged by virtue of this Act" did mean the whole of the tax payable by that person. I think Cozens-Hardy M.R.[4] must have taken that view because he points out that the penalty is greater than the penalty for fraudulent statements, and that was three times the tax on the difference. Fletcher Moulton L.J.[5]

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[2] [1909] 1 K.B. 694; 25 T.L.R. 342.

[3] [1910] A.C. 50; 26 T.L.R. 134.

[4] [1909] 1 K.B. 694, 700.

[5] Ibid. 703.

said in terms that that is the view he takes as to the meaning of the penalty section, and it was because, among other reasons, they thought the penalty was so largely exorbitant and so inappropriate in a case where there had been a minor error in a return that they came to the conclusion that the words "true "and correct" were not introduced.

The House of Lords[6] reversed that decision and they held that the words "as aforesaid" did introduce the words "true "and correct" as qualifying the return. Since the proceedings were proceedings for a penalty before the courts, it was limited to £50; it was not necessary for their Lordships in *Attorney-General* v. *Till*[7] to express any view as to the maximum amount of the penalty which could be recoverable before the commissioners, and accordingly no such view is expressed.

Mr. Orr, however, points out that none of their Lordships expressed any dissent from the view which the Court of Appeal had expressed as to what penalty was recoverable before the commissioners, but it was not of course necessary for their Lordships to do so. He has also drawn attention to a number of other passages in the speeches in which various of the members of the House of Lords draw attention to the high penalty which is exacted. I do not think, however, that I can find in that case any express indication that any of their Lordships have considered the possible alternative views as to the amount of the penalty.

I am, therefore, left with the opinions expressed in the Court of Appeal decision.[8] They are, I apprehend, obiter, and it was because of the absurd consequences of construing the section as imposing such a penalty that the Court of Appeal[8] felt compelled to hold that it did not apply to the sort of case where there had been an omission.

What the same members of the Court of Appeal would have held was the true amount of the penalty once they were constrained by the decision of the House of Lords to hold that the section did apply to a case of a minor omission I do not know, but I think it is clear that any court approaching a penalty section, and approaching a penalty section as I must approach it, on the view that it does apply to a minor omission such as the defendant made in this case, must construe it in favour of the subject and against the size of the penalty, if the words are reasonably capable of such a meaning. I do not think, therefore,

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[6] [1910] A.C. 50.

[7] Ibid.

[8] [1909] 1 K.B. 694.

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that there is any authority which constrains me to hold that the meaning for which Mr. Orr contends is to be preferred to the meaning which I have indicated, and which has the result of making the penalty more rational in relation to the default than the construction which Mr. Orr has put forward. I bear in mind the warning which has been given so many times, and which was given, indeed, in the House of Lords in *Attorney-General* v. *Till*[9] against being too hopeful of finding any rationality in the scheme set out under the Income Tax Acts. It does seem to me, however, that if there is a construction which makes the scheme less irrational than another, it is one which I would prefer.

In my view, in the circumstances of this case, the plaintiffs are entitled to recover only the sum of £20.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue.*

C. J. E.

[9] [1910] A.C. 50.

C. A.

1958 *Nov.* 28; *Dec.* 1, 2, 18.

Lord Evershed M.R., Lord Cohen and Sellers L.J.

BROWN *v.* JAMIESON AND ANOTHER.

Landlord and Tenant—Business premises (security of tenancy)—Decontrolled premises—Notice to quit—Validity—Notice given in November, 1956, *expiring November,* 1957*—Premises within Rent Acts when notice given—"Decontrolled" July,* 1957*—Landlord and Tenant Act,* 1954*, control applicable thereafter—Notice not in form prescribed by Act—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24 (3) (*b*), 43 (1)*—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11, *Sch.* 4, *paras.* 2, 11.

After the service of a notice to quit on the tenants of premises within the Rent Acts comprising a shop with living accommodation, but before the notice had taken effect, the Rent Act, 1957, came into force and the premises were no longer subject to control under the Rent Acts; accordingly, section 43 (1)[1] of the Landlord and

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[1] Landlord and Tenant Act, 1954, Part II "SECURITY OF TENURE FOR "BUSINESS, PROFESSIONAL AND OTHER "TENANTS," s. 23 (1): "Subject to "the provisions of this Act, this Part "of this Act [Part II] applies to any "tenancy where the property com"prised in the tenancy is or includes "premises which are occupied by the "tenant and are so occupied for the "purposes of a business carried on by "him or for those and other pur"poses."

S. 24: "(1) A tenancy to which "this Part of this Act applies shall "not come to an end unless ter"minated in accordance with the pro"visions of this Part of this Act; . . .

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Tenant Act, 1954, ceased to apply to the tenancy and it came within the provisions of Part II of the Act of 1954. The notice to quit was in accordance with the terms of the tenancy and would, admittedly, have been valid if the tenancy had not come within the Act of 1954. The notice was not, however, in the form required by that Act and the statutory regulations made under it:—

Held (Lord Cohen dissenting), that as the premises had become decontrolled during the period of notice and had, thereafter, come within the provisions of Part II of the Act of 1954, the saving by section 24 (3) (*b*) of that Act applied, and the notice to quit was valid, notwithstanding that it was not in the statutory form. Section 24 (3) (*b*) was to be literally interpreted and was not limited in its application to cases where the application of Part II of the Act was exclusively attributable to a change in the facts relating to the premises which had taken place after the service of the notice.

Orman Bros. Ltd. v. *Greenbaum* [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610 (affirming [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731) distinguished. Observations of Devlin J. ([1954] 1 W.L.R. 1520, 1525 and 1526) explained.

Semble. Although a "business tenant" formerly protected by the Rent Acts is entitled to the benefit of the Act of 1954 upon decontrol if his contractual tenancy is still subsisting at that date (and is not subject to a pending notice to quit), or if at the date of decontrol he was a statutory tenant, a tenant whose contractual tenancy was at that date subject to a pending notice to quit is deprived of protection under both the Acts of 1954 and 1957.

Per Lord Cohen. The ratio decidendi of *Orman Bros. Ltd.* v. *Greenbaum* (supra) was that, notwithstanding the generality of the language of section 24 (3) (*b*), it must be treated as limited in its operation to cases where the application of the Act of 1954 was exclusively attributable to a change of user of the premises since the service of the notice, or at any rate in matters of fact as distinct from the mere operation of legislation as respects the premises concerned.

"(3) Notwithstanding anything in "subsection (1) of this section,—(*a*) "where a tenancy to which this Part "of this Act applies ceases to be such "a tenancy, it shall not come to an "end by reason only of the cesser, . . . "(*b*) where, at a time when a tenancy is not one to which this Part "of this Act applies, the landlord "gives notice to quit, the operation "of the notice shall not be affected "by reason that the tenancy becomes "one to which this Part of this Act "applies after the giving of the "notice."

[Ss. 41 and 42 deal with the cases where a tenancy is held on trust and by a member of a group of companies respectively.]

S. 43 (1): "This Part of this Act "[Part II] does not apply— . . . (*c*) "to a tenancy where the property "comprised therein is let under a letting to which the restrictions on the "obtaining of possession by the "landlord imposed by section 3 of "the Rent and Mortgage [Interest] "Restrictions (Amendment) Act, "1933, apply in relation to the "tenant, or would apply but for subsection (7) of section 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; . . ."

APPEAL from Judge Cohen sitting at Stockton-on-Tees County Court.

On May 5, 1944, James Jamieson and Elsie Jamieson, his wife, became the tenants of Mrs. Hilda Brown (hereinafter called "the landlord") of premises known as "Park Lane Stores," 97, Yarm Road, Stockton-on-Tees. The premises consisted of a shop with living accommodation above it. The rent was 25s. per week and the tenancy was determinable by 12 months' notice by either side. On November 14, 1956, the landlord served on the tenants a written notice to quit the premises on November 16, 1957. The rateable value of the property was £40, and it was not disputed that, until the coming into force of the Rent Act, 1957,[2] the premises were within the scope of the Rent Acts. On July 6, 1957, when that Act came into force, the premises were no longer subject to control under the Rent Acts, and section 43 (1) (*c*) of the Landlord and Tenant Act, 1954, thereafter ceased to apply to the tenancy, and Part II of the Act of 1954 became applicable. The landlord brought proceedings for possession but in the county court the tenants submitted that the notice, though in accordance with the terms of the tenancy and otherwise valid, was not in the form prescribed by the Landlord and Tenant (Notice) Regulations, 1954 (S.I. 1957, No. 1107), and that, therefore, it was ineffective to determine the tenancy. The county court judge gave judgment in favour of the tenants and the landlord appealed.

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[2] Rent Act, 1957, s. 11: "(1) The "Rent Acts shall not apply to any "dwelling-house the rateable value "of which on November 7, 1956, ex-"ceeded, in the Metropolitan Police "District or the City of London £40, "elsewhere in England or Wales £30, "and in Scotland £40. . . . (4) "Nothing in the foregoing provi-"sions of this section shall affect the "operation of Part I of the Landlord "and Tenant Act, 1954. . . . (7) The "transitional provisions contained in "the Fourth Schedule to this Act "shall have effect in relation to "dwelling-houses which cease to be "subject to control by virtue of sub-"section (1) or (3) of this section; "and those subsections shall have "effect subject to the provisions of "paragraph 3 of Part I of the Fifth "Schedule to this Act."

S. 27: ". . . (2) This Act shall come "into force on the expiration of the "period of one month which begins "with the date of the passing "thereof. . . ."

Fourth Sched., para. 2: "(1) "Where immediately before the time "of decontrol the dwelling-house was "the subject of a statutory tenancy "or of a controlled tenancy which "would or might come to an end "within 15 months of that time by "efflux of time or notice to quit, "the tenant under that tenancy shall "be entitled until the date herein-"after mentioned, and subject to the "following provisions of this Schedule, "to retain possession of the dwelling-"house in the like circumstances, to "the like extent and subject to the "like provisions (including in particu-"lar provisions as to recovery of "possession by the landlord) as if the "Rent Acts had not ceased to apply "to the dwelling-house. . . . (6) This "paragraph shall not apply to a "tenancy to which, immediately after "the time of decontrol, Part II of "the Landlord and Tenant Act, 1954, "applies."

Para. 11: "A statutory tenancy "which, immediately before the "time of decontrol, was one to which, "but for paragraph (*c*) of subsection "(1) of section 43 of the Landlord "and Tenant Act, 1954, Part II of "that Act would have applied if it "had been a tenancy within the "meaning of that Act, shall after the "time of decontrol be deemed for the "purposes of that Act to be a tenancy "to which Part II thereof applies, "being a tenancy continuing by "virtue of section 24 of that Act after "the expiry of a term of years cer-"tain, and accordingly paragraph 2 "of this Schedule shall not apply "to it."

P. V. Baker for the plaintiff landlord. At the time when the notice to quit was served the tenancy was not within the scope of Part II of the Act of 1954 because of section 43 (1) (*c*), but when the Rent Acts ceased to apply to it, the exclusion from the Act of 1954 no longer applied. The case appears to be within the plain meaning of section 24 (3) (*b*), but the judge held that that plain meaning had to be modified and that paragraph (*b*) did not apply unless the applicability of the Act of 1954 was attributable to a change in user of the premises since the service of the notice. In reaching that conclusion, he attached weight to the decisions in *Castle Laundry (London) Ltd.* v. *Read*[3] and *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[4] and to *Orman Bros. Ltd.* v. *Greenbaum.*[5] Those cases were so different on their facts that they do not assist. The onus of proving that they are entitled to the protection of the Act of 1954 is on the tenants. *Orman Bros. Ltd.* v. *Greenbaum*[5] is a transitional case and does not lay down any widely applicable principle. In that case, unlike the present, the notice to quit was served before the Act of 1954 had come into force. In *Castle Laundry (London) Ltd.* v. *Read*[6] it was common ground that the tenancy was a tenancy of business premises to which the Act of 1954 applied, but the issue was whether a landlord who had determined a contractual tenancy by exercising an option to break in accordance with the terms of the lease, but not with section 25 of the Act of 1954, could serve a statutory notice within the next period to determine the "business statutory tenancy." There is no business statutory tenancy in this case, for such a tenancy can only arise under section 24 (1), and that provision has to be read subject to subsection (3). If the tenant is not in occupation for the purposes of the business when a notice to quit is served, as in *Teasdale* v. *Walker*,[7] section 24 does not apply. The discussion of the scope of section 24 (3) (*b*) in *Teasdale* v. *Walker*[7] is of interest and suggests that the court took the view that section 24 (3) (*b*) was not limited in its application to cases where there had been a change of user.

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[3] [1955] 1 Q.B. 586; [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154.

[4] [1958] Ch. 437; [1958] 2 W.L.R. 1; [1957] 3 All E.R. 663.

[5] [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610.

[6] [1955] 1 Q.B. 586.

L. A. Blundell for the defendant tenants. This case is indistinguishable from *Orman's* case,[8] which decided that where the Act of 1954 commences to apply during the currency of a notice to quit a business tenancy, the tenancy is not one which "becomes "one to which this Part of this Act applies" for the purposes of section 24 (3) (*b*). Section 24 (3) (*b*) is limited in its application to cases where there has been a change in the physical circumstances which determine whether the tenancy is one to which Part II of the Act applies, that is to say either user or facts relevant to sections 41 and 42. If the meaning of the words of subsection (3) is as is submitted by the landlord, it would have been so held in *Orman's* case.[8]

The Rent Act of 1957 was enacted after the decision in *Orman's* case,[8] in which Lord Goddard C.J. adopted and approved the whole of Devlin J.'s judgment. Parliament must be taken to have had knowledge of that decision and to have endorsed the exegesis of the section by Devlin J.

If the landlord is right, then the tenant has lost all protection, both under the Rent Acts and the Act of 1954. This is an anomaly, for the Rent Act, 1957, provides transitional protection for a contractual tenant formerly within Rent Act protection if the contract is not subject to a notice to quit, and even a statutory tenant is better off than the present type of tenant.

In the present case the notice to quit was served before the Act of 1957 was passed, but if the anomalous gap exists, landlords were presented with a golden opportunity of getting rid of unwanted tenants, for the Act was suspended in operation for one month after it was passed and a landlord could have served his notice in that period when he saw that the premises would no longer be subject to control under the Rent Acts.

When one considers this extraordinary effect of the Rent Act, 1957, if the meaning attributed to section 24 (3) (*b*) of the Act of 1954 by the landlord is accepted, one is entitled to say that Parliament must have accepted the meaning put on paragraph (*b*) by the courts and so deliberately omitted any provision dealing with this type of case. [Reference was made to *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell*,[9] *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[10] and *The Olympic.*[11]] Where Parliament has made a further enactment using a phrase which has been interpreted in a certain way by the courts, it will be taken (unless the contrary appears) that Parliament has approved the meaning attributed to the phrase by the courts: Maxwell on the Interpretation of Statutes, 10th ed., p. 313, and the cases there cited.

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[7] [1958] 1 W.L.R. 1076; [1958] 3 All E.R. 307.

[8] [1955] 1 W.L.R. 248.

The notice may have been effective to determine the contractual tenancy but left the tenants in the position of "statutory "business tenants" entitled to receive a further notice under the Act of 1954: see *Castle Laundry (London) Ltd.* v. *Read*[12] and *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[13] These were both cases where the notice served was exercising an option to break a term, but for present purposes there is no distinction between such a notice and an ordinary notice to quit. *Teasdale* v. *Walker*[14] is not helpful.

P. V. Baker in reply. The principle to be deduced from *Orman's* case[15] is that section 24 (3) (*b*) does not apply to a case where the notice to quit was served before the Act came into force, and the only reason that it did not apply was because it was not in force. Devlin J.[16] was not trying to construe section 24 (3) (*b*). He was indicating what was the plain and ordinary sort of case to which the provision was intended to apply, but he was not saying that it must be confined to that. The discussion of the object of the section would be obiter. The object of a statute is only relevant as an aid to the construction of an ambiguity and it is unnecessary to consider it when, as here, the statutory words are clear.

The principle in *Royal Crown Derby Porcelain Co. Ltd.* v *Russell*[17] applies only to a re-enactment and is not in point here. There is a lacuna, but it is not the function of the courts to fill it.

On the plain words of section 23 (1) this is a case to which Part II of the Act of 1954 applies. When the Rent Act ceased to apply in 1957, the Act of 1954 applied. It may be that most of the subsequent provisions of the Act do not benefit the tenant.

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[9] [1949] 2 K.B. 417; [1949] 1 All E.R. 749.

[10] [1933] A.C. 402; 49 T.L.R. 391.

[11] [1913] P. 92; 29 T.L.R. 335.

[12] [1955] 1 Q.B. 586.

[13] [1958] Ch. 437.

[14] [1958] 1 W.L.R. 1076.

[15] [1955] 1 W.L.R. 248.

[16] [1954] 1 W.L.R. 1520, 1524.

[17] [1949] 2 K.B. 417.

Only section 40 appears to apply, but the tenancy clearly comes within section 23.

Cur. adv. vult.

December 18. Lord Evershed M.R. stated the facts and said: The question for the court is whether, by virtue of section 24 (3) (*b*) of the Landlord and Tenant Act, 1954, the notice to quit took full effect so as to determine the tenants' right of occupation on its expiry on November 16, 1957; or whether, since the notice did not satisfy the requirements of the Act of 1954 and the regulations thereunder, the defendants' tenancy still subsists and will continue so to do until determined in due accordance with the last-mentioned Act and regulations.

[His Lordship read section 24 of the Landlord and Tenant Act, 1954, as set out above, and continued:] Upon a first reading of paragraph (*b*) of subsection (3) it would appear precisely to cover the present case. At a time when the defendants' tenancy was not one to which Part II of the Act of 1954 applied, the plaintiff landlord had given a notice to quit, fully complying with the contract of tenancy. It follows, therefore, according to the argument on the landlord's behalf, that " the operation of the " notice " (which must mean its effect to determine the tenancy) is not affected by the circumstance that, after the giving of the notice, but before its expiry, Part II of the Act of 1954 became applicable to the tenancy.

The judge in a reserved judgment rejected the plaintiff's claim. His conclusion was based on certain decisions of the courts and particularly on the decision of this court in *Orman Bros. Ltd.* v. *Greenbaum*,[1] affirming the judgment of Devlin J.,[2] as binding him to hold that section 24 (3) (*b*), notwithstanding the generality of its language, must be treated as limited in its operation to cases where the application of the Act of 1954, after the giving of a notice to quit, is exclusively attributable to a change of user of the premises since that date; or at any rate to matters of fact as distinct from the mere operation of legislation as respects the premises concerned.

The plaintiff landlord has appealed from the judge's rejection of his claim. In the circumstances, the first question for our consideration is: What is the true scope and effect of the *Orman* decision? [3] There is no doubt that the facts in that case differed

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[1] [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610.

[2] [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731.

[3] [1955] 1 W.L.R. 248.

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from those in the present case in this material respect, that in the former, the notice to quit, though given after the Act of 1954 had received the Royal Assent, was given before, but expressed to take effect after, the Act came into operation. In *Orman's* case,[3] therefore, the reason for the non-application of the Act of 1954 at the date of the notice did not depend upon the premises in question being, by reason of the particular facts or circumstances relating to them, excluded from the Act's operation so long as those facts or circumstances were unchanged; but depended on the single circumstance that at such date the Act itself had not come into operation at all.

In the view of Devlin J.[4] the words "at a time when a "tenancy is not one to which this Part of this Act applies" in section 24 (3) (*b*) clearly carry with them the implication that at the relevant time (that is, the date of the giving of the notice) the Act of 1954 is already in force—an implication plainly inherent (I may add) in the language of paragraph (*a*) of the same subsection. In this court Lord Goddard C.J., in giving the leading judgment, described Devlin J.'s judgment as "entirely right and "impeccable."[5] The view of Devlin J. which I have quoted, affirmed in this court in the language which I have also cited—a view with which I respectfully most fully concur—was sufficient to determine *Orman's* case,[6] but would have no decisive effect in the present action; since in this case the Act of 1954 was in force at the date of the giving of the notice by the landlord on November 14, 1956. But did Devlin J.'s decision and its affirmation go further? Can it be said that its ratio or one of its rationes was that which I have attempted to express above, namely, that section 24 (3) (*b*) is limited in its operation to cases where the application of the Act of 1954 to the premises after the date of the notice (but before its expiry) depends upon a change of user of the premises? The proposition which, according to Mr. Blundell for the tenants in this court, is enshrined and inherent in the decision in *Orman's* case [6] was expressed by him as follows: The words in the subsection "the tenancy becomes one to which "this Part of this Act applies" refer not to the moment when the Act of 1954 becomes operative as a matter of law as respects that tenancy, but to a change in the physical circumstances as to user, etc., which determine whether a tenancy is a "business "tenancy" to which Part II of the Act applies. The words "et cetera" are inserted in his formula by Mr. Blundell for the

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[3] [1955] 1 W.L.R. 248.
[4] [1954] 1 W.L.R. 1520, 1525.
[5] [1955] 1 W.L.R. 248, 250.
[6] [1955] 1 W.L.R. 248.

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purpose of making allowance for the possible effects of the provisions of sections 41 and 42.

Mr. Blundell's argument depends first upon two passages in Devlin J.'s judgment: and since, as I have earlier stated, Lord Goddard C.J. described that judgment as "entirely right and "impeccable," it is necessary to set out those two passages in full. The first is[7]: "That is subject to Mr. Sherrard's alter-"native argument, which is, that if he is caught by sub-"section (1)"—that is, of section 24—"then he is taken out of "it by subsection (3). I think the object of that subsection is "clear enough. It is not intended merely as a transitional "provision to cover notices to quit that are served before the "coming into force of the Act; it is intended as a permanent "provision of the Act, and its object is to meet with the "situation in which there is a change of user between the serving "of the notice and its taking effect, a change of user which "might bring the tenancy within the Act. Thus, if instead of "reading 'tenancy is not one to which this Part of this Act "'applies' I call it, not precisely but no doubt for general "purposes sufficiently accurately, a 'business tenancy,' the "subsection would read in this way: 'where, at a time when a "'tenancy is not a business tenancy, the landlord gives notice to "'quit, the operation of the notice shall not be affected by reason "'that the tenancy becomes a business tenancy after the giving "'of the notice.' That is a plain, simple and no doubt necessary "provision."

Then later on the same page and immediately after his expression of the view which I earlier cited in this judgment, Devlin J. continued: "It is perfectly true, of course, that the Act does not "apply to any tenancies before October 1, or, at any rate, before "July 30, but that division in time is not what is intended by "this subsection. The subsection intends a division in character, "and I think Mr. Lawson is right in his argument when he "says that when one is applying that subsection at a time when "a tenancy is not one to which this Part of this Act applies, one "has to assume that the Act itself is already in force and "applying, and then consider whether in its terms it does or does "not cover that particular class of tenancy."

It will be observed from the opening words of the earlier of these two passages that, in them, Devlin J. was dealing only with an alternative argument put before him on the landlord's behalf.

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[7] [1954] 1 W.L.R. 1520, 1525.

Neither of the two passages was in terms cited in the judgments on the appeal in this court. The alternative argument in question was dealt with by Lord Goddard C.J. in the short paragraph at the end of his judgment where he said[8]: "The only other "point on which it is necessary to say a word is this: Mr. "Wilson's submission was that if we were against him on the "point which I have just decided, the position is saved for him "by section 24 (3). The judge thought that that subsection quite "clearly meant that if the tenancy was, say, of a private house "to which Part II did not apply at all, and notice to quit that "house was given, such notice would remain good and effective "although before it became effective the house had been turned "into a shop, and therefore would otherwise be the subject of "Part II of the Act. That view is one with which I entirely "agree. I think that Devlin J.'s judgment was perfectly right, "and that this appeal fails." Singleton L.J. confined himself to concurrence with Lord Goddard C.J., and I find nothing pertinent to the point now in question in the judgment of Romer L.J.—save that he, too, expressed agreement with Lord Goddard C.J. I do not, however, forget that Lord Goddard both at the beginning and at the end of his judgment expressed entire concurrence with Devlin J.'s judgment.

How far, then, to pose again the essential question already formulated, must the language of Devlin J. be taken to amount to an exegesis of the subsection, in the sense for which Mr. Blundell contends, binding upon this court by reason of this court's affirmation of the judgment in its entirety?

I first observe that in strictness the question, as it is now sought to be formulated, was not necessary to Devlin J.'s conclusion. I observe also, for what it is worth, that there is neither in the recital of the facts in the report of 1954, nor in Devlin J.'s judgment itself, any precise statement of the nature or circumstances of the tenants' business, as might (I think) have been expected had Devlin J. intended to found himself on the interpretation of the subsection attributed to him. We are told that the premises in question were factory premises, and that the tenancy was a business tenancy. But that is all. True, the judge paraphrased the subsection by substituting the words "business "tenancy" for the longer statutory formula. But the paraphrase was after all not expressed as intended to be precise. Likewise, Devlin J. had qualified his rejection of the view of the subsection as a "transitional provision" by the use of the adverb "merely" in the phrase "merely as a transitional provision to cover notices "to quit that are served before the coming into force of the "Act."[9] And in the same way Lord Goddard C.J.'s exposition is shown to be illustrative by his use of the word "say."[10] It seems to me that both Devlin J. and Lord Goddard C.J. were illustrating the real basis of their conclusion—namely, that the subsection was intended, and only intended, to apply where, the Act of 1954 having been in force at all relevant times, its partial application depended upon some change in the situation or status of the premises—by reference to the most obvious case of the change arising from a change of user. But I have in the end, and with a hesitation proper to the circumstance that Lord Cohen has formed a contrary view, come myself to the conclusion that it would not (in the absence of some other compelling reason) be right to treat those judgments as laying down a far-reaching interpretation of the subsection upon a point not necessary to their decision, and thereby of substituting for the Parliamentary language some wholly different terms.

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[8] [1955] 1 W.L.R. 248, 253.

For that would be the effect of accepting Mr. Blundell's argument. It would mean that henceforth the subsection must be interpreted by the courts as though it had read: "where, at a "time when a tenancy is not a business tenancy, the landlord "gives notice to quit, the operation of the notice shall not be "affected by reason that the tenancy becomes a business tenancy "after the giving of the notice." But that is not the language which Parliament has enacted. Had Parliament intended so to enact, there would clearly have been no difficulty in so doing. I cannot for myself think that (unless, again, there is some compelling reason for so doing) we ought now to hold that Devlin J. in 1954, and the Court of Appeal in 1955, intended so rigidly to interpret (and require thereafter to be interpreted) the apparently simple language of the Act—and so by anticipation to determine the question which has now arisen but which was not then at all before them. I add that I cannot get additional authority for so doing from the use of the words "and applying" in the final sentence of the second of the two passages which I have quoted above from Devlin J.'s judgment.[11]

Is there, then, some other compelling reason for so interpreting and limiting the subsection? Mr. Blundell raised a formidable point before us on the Fourth Schedule to the Rent Act, 1957.

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[9] [1954] 1 W.L.R. 1520, 1525.

[10] [1955] 1 W.L.R. 248, 253.

[11] [1954] 1 W.L.R. 1520, 1525.

That schedule contains (expressly) transitional provisions taking effect by virtue of section 11 (7) of the Act in cases of decontrol under the earlier terms of that section—provisions designed to give a measure of temporary protection to the tenant whose premises become decontrolled. Paragraph 2 (6) provides that this transitional protection is inapplicable to a tenancy to which, immediately after the decontrol, Part II of the Act of 1954 is applicable. Paragraph 11 of the same schedule is referable to the case where a formerly controlled contractual tenancy under the Rent Acts has been determined so that the tenant was a "statutory tenant" upon decontrol, but where his tenancy is a business tenancy to which the Act of 1954 would, apart from the Rent Restriction legislation, have been applicable. In this case, too, the tenant is treated as having the protection of the Act of 1954 from the moment of decontrol, and he is therefore excluded from the operation of the transitional provisions in the Fourth Schedule to the Act of 1957. Mr. Blundell pointed out, therefore, that the "business tenant" formerly protected by the Rent Restriction legislation is entitled to the benefit of the Act of 1954 upon decontrol if his contractual tenancy is still subsisting at that date (and not the subject of a pending notice to quit) and, also, if his contract had been determined prior to the date of decontrol. The anomalous case is that of a tenant whose contractual tenancy was subject to a notice to quit pending at the date of decontrol; since (as Mr. Blundell contends) if his argument is not accepted, that tenant, and that tenant alone, would be deprived of any protection, upon decontrol, equally under the Act of 1954 and the Act of 1957.

And the anomaly is made all the more striking by the provision, in section 27 (2) of the Act of 1957, that it should come into force at the expiration of one month beginning with the date of its passing—a period sufficient to enable any landlord, sufficiently astute to notice the anomaly, to serve upon his tenant a notice to quit expiring after the month.

It was Mr. Blundell's submission that Parliament, in enacting the Act of 1957, and, in particular, its Fourth Schedule, must be taken to have proceeded on the view that the decision in *Orman's* case [12] avoided the anomaly. There is no doubt authority for the view that Parliament must be treated as being acquainted with the state of the law as established by the courts' decisions. Thus, if a particular formula has been interpreted by the courts, Parliament may be assumed, if it re-enacts that formula, to have

[12] [1955] 1 W.L.R. 248.

intended its interpretation to be that previously given to it by the courts. (See Maxwell on Interpretation of Statutes, 10th ed., p. 313, and cases there cited.) But Mr. Blundell's submission in the present case seems to me to go far beyond the warrant of any such authority; for it involves that Parliament, in enacting the Fourth Schedule to the Act of 1957, deliberately omitted any provision relative to the case of a tenancy becoming decontrolled in respect of which a notice to quit was pending at the date of decontrol, in reliance upon a decision in a case in which that set of facts did not at all arise.

I am, therefore, unable to accept the contention that the Act of 1957 involves legislative recognition of the view of the *Orman* decision [13] for which Mr. Blundell has argued. The question was also raised whether section 24 (3) (*b*) could be interpreted as meaning that the notice to quit was effective only to determine the contractual tenancy (in such a case as the present) so as to leave the defendants in the position of "statutory business "tenants" entitled to receive a further notice to quit in accordance with the Act of 1954 and regulations before their right of occupation was put an end to. But if this point were correct, it would apply equally, so far as I can see, in what I have called the "obvious" case taken by Devlin J. of a residential tenant adopting a business user after the receipt of the notice to quit. This attempted solution of the difficulty equally, therefore, in my judgment, fails.

Certain other cases were referred to in the argument, and in the judgment of the judge; but I do not further refer to them since none of them, in my view, assists in the determination of the present appeal. The sole question, therefore, that remains is the question earlier posed—What is in truth the effect of the decision in *Orman's* case? [14] There is beyond doubt a strong case on grounds of common sense and common justice for avoiding the anomaly of which, if Mr. Baker's argument prevails, the plaintiff is here entitled to take advantage. It may well be supposed that the legislature, if the point had been present to its mind, would not have intended such anomaly. But it is not the function of the court to improve upon the Parliamentary performance. If, upon the true construction of the relevant Acts, the anomaly is there, the courts cannot legislate to make good the omission.

I have already indicated my reasons for being unable to accept the view of the *Orman* decision [14] for which Mr. Blundell contends. I add one further consideration. If Mr. Blundell's argument is to prevail, then, so far as I can see, Devlin J. must be taken to have based his conclusion on two distinct and independent grounds, namely, (1) that the words in the subsection " tenancy " is not one to which . . . this Act applies " mean a tenancy that is not a " business tenancy," and (2), that the words " at a time " when . . ." etc., carry the implication that at the relevant time the Act of 1954 is already in force. The two suggested grounds are, as I have said, wholly independent, for the one in no sense follows from the other. Each, of itself, would have been sufficient to dispose of *Orman's* case [14]; only the first has a decisive effect in the present case.

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[13] [1955] 1 W.L.R. 248.

[14] Ibid.

I can see no trace in his judgment that Devlin J. thought that he was founding himself upon two distinct lines of reasoning. As I read his judgment the judge was rather expounding a single answer to the argument of the landlord's counsel; and if the first suggested ground is treated (as I have earlier indicated) as illustrative of the second, then the two become complementary and coherent. If the first suggested ground was intended as distinct and independent, then it seems to me surprising that (as I have said) there should have been such extremely slender reference made to the actual user of the premises. What I have said applies with equal force, in my judgment, to the judgment of Lord Goddard C.J.

For these reasons I have felt, after much hesitation and with some feelings of regret, forced to the conclusion that *Orman's* case [15] does not now bind us to accept the conclusion of the county court judge. It follows that, construing section 24 (3) (*b*) unaided by authority, I would hold that it means what it says, and would allow this appeal.

Lord Cohen, having stated the facts, continued: It is common ground that throughout the tenancy the male tenant, either himself or by one of his children, has carried on business on the premises. The premises were therefore business premises which would have been within the ambit of Part II of the Landlord and Tenant Act, 1954, when that Act came into force, had it not been for the provisions of section 43 (1) (*c*) of the Act. [His Lordship read paragraph (*c*) and continued:] It is admitted that the premises fell within this exception and it follows that when giving the notice to quit of November 14, 1956, the landlord did not have to comply with the requirements of the Landlord and Tenant Act,

[14] [1955] 1 W.L.R. 248.

[15] Ibid.

1954. On July 6, 1957, however, the Rent Act, 1957, came into force, and under section 11 (1) of that Act the tenant ceased to be entitled to the protection of the Rent Restrictions Acts and would, accordingly, have been bound to give up possession on November 16, 1957, unless he could claim protection either under Part II of the Landlord and Tenant Act, 1954, or under the transitory provisions of the Rent Act which are to be found in the Fourth Schedule to that Act. He did not give up possession, and on March 26, 1958, the landlord commenced these proceedings. On June 16, 1958, the county court judge dismissed the claim on the ground that, although the contractual tenancy between the parties had come to an end, the tenants were still entitled to retain possession until their right was determined by a notice to quit which complied with the provisions of the regulations made under the Landlord and Tenant Act, 1954.

In order to make clear the issues between the parties I must now refer to the relevant provisions of the Landlord and Tenant Act, 1954, Part II. [His Lordship read section 23 (1) and referred to section 24 (1) and (3) (*b*). He continued:] I pause here to observe that this last subsection is the one on which the determination of the issues between the parties mainly depends. I must, however, refer briefly to one or two other provisions. Section 25 (1) provides for the method of determination of tenancies to which Part II of the Act applies. Section 43, which I have already mentioned, provides that the Act is not to apply to certain classes of tenancy, including a tenancy of an agricultural holding, a tenancy created by a mining lease, and, as I have already said, a tenancy protected by section 3 of the Rent and Mortgage Restrictions (Amendment) Act, 1933.

Returning to section 24 (3) (*b*), the landlord's argument is short and, at first sight, very attractive. He says the language of the section is plain and unambiguous. The notice to quit was given at a time when the tenants held under a tenancy which was not one to which Part II of the Landlord and Tenant Act, 1954, applied; the operation of the notice was therefore not affected by the fact that on the coming into force of the Rent Act, 1957, the tenancy became one to which Part II of the Landlord and Tenant Act, 1954, applied; effect can only be given to this provision by holding that on the expiry of the notice the relation between the parties was brought to an end.

Had the matter been free from authority I should, I think, have been inclined to accept this argument, but the matter is not free from authority, and Mr. Blundell, for the tenants, submits that the section only assists a landlord where the tenancy has become a tenancy to which Part II applies, not as the result of an alteration in the law, but by reason of some change in physical circumstance such as a change of the user of the premises. This was the argument accepted by the county court judge, and it is based mainly on the decision of Devlin J. in *Orman Bros. Ltd.* v. *Greenbaum.*[16] That decision was affirmed by the Court of Appeal,[17] but, as Lord Goddard C.J., delivering the leading judgment, said that he agreed completely with the judgment of Devlin J., it will be sufficient if I refer to the decision in the lower court. In that case the premises were business premises which were clearly within the ambit of Part II of the Landlord and Tenant Act, 1954. At the time when the notice to quit was given, that Act did not apply to the premises, not because of section 43 of the Act, but because the Landlord and Tenant Act, 1954, had not come into force. The plaintiff contended that section 24 (3) (*b*) applied, but the judge rejected this submission. The first material passage of his judgment [18] has already been read by my Lord, and I need not repeat it. That passage seems to me to be the judge's exposition of the section. In describing his use of the term "business tenancy" as not precise, the judge had in mind, I think, the reference in section 23 (1) to premises (and I quote from the subsection): "occupied for the "purposes of a business carried on by him or for those and other "purposes."

The judge then sets out Mr. Sherrard's argument to the contrary. That was not read by my Lord, and I now read it.[19] "But Mr. Sherrard argues that whatever the object of the sub-"section may be, the language is wide enough for his purposes "and he can use it as, so to speak, a transitional provision. "He seeks to apply it in this way: As to the first part of sub-"section (3) (*b*)—'where, at a time when a tenancy is not one "'to which this Part of this Act applies, the landlord gives "'notice to quit'—he says the landlord gave notice to quit on "August 31 and the tenancy, although a business tenancy, was "not then one to which this part of the Act applied, because the "Act did not apply to any tenancy at all, not having come into "force until October 1. Accordingly, he comes within the sub-"section and he then says: As to the second part of the para-"graph—' the operation of the notice shall not be affected by

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[16] [1954] 1 W.L.R. 1520.
[17] [1955] 1 W.L.R. 248.
[18] [1954] 1 W.L.R. 1520, 1525.
[19] Ibid. 1525.

" 'reason that the tenancy becomes one to which this Part of " 'this Act applies after the giving of the notice'—the " 'becoming' in his case is the coming into force of the Act which " affects the tenancy."

The judge then proceeds to explain why he rejects Mr. Sherrard's argument. I need not read the passage in which he does so, as the material portions of it were read by my Lord. In it, as I read his judgment, the judge no doubt emphasizes that the words " at a time when the tenancy is not one to which this " Part of the Act applies " carry with them the implication that at the time when one is considering the matter the Act of 1954 is in force, but he is doing so not, I think, in order to make this the basis of his decision, but rather to reinforce the conclusion he had stated in the first passage I have cited from his judgment.

Mr. Baker, for the landlord, does not dispute that the object of section 24 (3) (*b*) may have been to deal with the situation in which there is a change of user between the serving of the notice and its taking effect, a change of user which might bring the tenancy within the Act. He argues, however, that to deal with this situation Parliament has used language which plainly covers other situations, such as the one which has arisen in the case now before this court, and that there is no justification for cutting down the natural meaning of the language used.

Reading the judgment of Devlin J. as a whole, I am unable to accept this argument. I think that by emphasizing that the subsection is not intended as a transitional provision and by restating the section as meaning " where at a time when a " tenancy is not a business tenancy the landlord gives notice to " quit, the operation of the notice shall not be affected by reason " that the tenancy becomes a business tenancy after the giving " of the notice," the judge was indicating his ratio decidendi to be as follows: (1) The plain policy of Part II of the Act was to protect tenants of business premises; (2) This policy would be defeated unless some limitation is placed on the apparently wide meaning of the language used in section 24 (3) (*b*); (3) The appropriate limitation is that indicated in his (the judge's) rewriting of the section. That ratio decidendi was approved in this court, and I think we are bound, as was the county court judge, to hold that the tenancy envisaged by the Act of 1954 has not come to an end.

The county court judge also referred to the decisions of Sellers J. in *Castle Laundry (London) Ltd.* v. *Read*[20] and of

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[20] [1955] 1 Q.B. 586; [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154.

Harman J. in *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[21] The facts of those cases are different from those in the present case and I cannot derive much assistance from them, but it is perhaps worth observing that Sellers J. recognized in the *Castle Laundry* case[22] the possibility that a contractual tenancy of premises might be terminated but the business tenancy under the Act might continue until determined in accordance with the regulations made thereunder.

Mr. Blundell sought to reinforce his argument by indicating the anomalous position that would arise if the appeal were to succeed. He called our attention to the following provisions of the Rent Act, 1957, s. 11 (4) (7) and Sched. 4, paras. 2 (1) (6) and 11. Section 11 (4) provides that "Nothing "in the foregoing provisions of this section"—which is the section releasing from control under the Rent Acts a large number of properties—"shall affect the operation of Part I of the "Landlord and Tenant Act, 1954." Subsection (7) of section 11 refers to the transitional provisions set out in the Fourth Schedule to the Act. I do not think I need refer in detail to the provisions of paragraph 2 of that Schedule. It is sufficient to say that paragraph 2 (1) deals with the case of dwelling-houses and subparagraph (6) provides: "This paragraph shall not apply to a "tenancy to which, immediately after the time of decontrol, "Part II of the Landlord and Tenant Act, 1954, applies." Paragraph 11 is the one which deals with statutory tenancies and gives some measure of protection to statutory tenants.

The effect of these provisions is to show an intention not to interfere with the operation of the Landlord and Tenant Act, 1954, and to ensure a measure of protection during a transitional period to all tenants of decontrolled dwelling-houses and to tenants of decontrolled business premises where the tenancy was still in force and no notice of determination had been given or where the tenant was a statutory tenant. As Mr. Blundell said, it would indeed be anomalous if a tenant whose tenancy of business premises had been the subject of a notice to quit which had not expired should be in a worse position than a statutory tenant of similar premises. He submitted that the language of section 24 (3) is ambiguous and that Parliament must be taken to have known of the decision of this court in *Orman*

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[21] [1958] Ch. 437; [1958] 2 W.L.R. 1; sub nom. *In re Bleachers' Association's Leases, Weinbergs Weatherproofs* v. *Radcliffe Paper Mill Co. Ltd.* [1957] 3 All E.R. 663.

[22] [1955] 1 Q.B. 586, 592.

Bros. Ltd. v. *Greenbaum*[23] and to have enacted the Rent Act, 1957, on the basis of that decision, as Mr. Blundell interpreted its ratio decidendi. He relied on the observations of Denning L.J. in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell*,[24] which read as follows: "The true view is that the court will be slow to "overrule a previous decision on the interpretation of a statute "when it has long been acted on, and it will be more "than usually slow to do so when Parliament has, since the "decision, re-enacted the statute in the same terms." I am unable, however, to derive help from these observations in deciding the present case, since I cannot find that the decision in *Orman's* case,[25] based on different facts, has long been acted on; nor can I agree that the language of section 24 (3) (*b*) is ambiguous.

I return, therefore, to section 24 (3) unassisted by any inference from the passing of the Rent Act, 1957. The language of the subsection is, as I have said, unambiguous, and it is indeed couched in such wide terms that read literally the decision in *Orman's* case[25] should have been the other way. I am compelled, however, by that decision to place some limitation on it. Lord Evershed M.R. has suggested that the only limitation necessary is that the Act of 1954 should have been in force at all relevant times. I agree that that is a possible construction, but I am unable to agree that it was the ratio decidendi adopted by Devlin J. and the Court of Appeal in *Orman's* case.[25] On the contrary, I think that their ratio decidendi was, to adopt the language of Lord Evershed M.R., that "notwithstanding the "generality of its language" the subsection "must be treated as "limited in its operation to cases where the application of the "Act of 1954 is exclusively attributable to a change of user of "the premises since that date or at any rate to matters of fact "as distinct from the mere operation of legislation as respects the "premises concerned."

Sitting in this court, I am bound by the ratio decidendi in *Orman's* case,[25] a position that I welcome as it enables me to avoid the anomaly which, as Lord Evershed M.R. has so clearly pointed out, would arise from allowing the appeal in the present case.

I would dismiss the appeal.

SELLERS L.J. The Landlord and Tenant Act, 1954, by section 24 (1), provides that a tenancy to which Part II of the

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[23] [1955] 1 W.L.R. 248.

[24] [1949] 2 K.B. 417, 429.

[25] [1955] 1 W.L.R. 248.

Act applies (which is a business tenancy within the meaning ascribed by the Act) shall not come to an end unless terminated in accordance with the provisions of the Act.

It has been held by this court in *Orman's* case,[26] accepting the judgment of Devlin J., that that provision has to be interpreted literally. It was put this way by the trial judge in the case: "If one applies that literally, the position is this: One has to ask "oneself: On October 5, did this tenancy come to an end? The "Act is then unquestionably in force. It is then a tenancy to "which this part of the Act applies, because it is a business "tenancy. Has it come to an end? It does not come to an end "unless notice to quit has been given in accordance with the "provisions of the Act, and notice to quit has not been given in "accordance with the provisions of the Act and, therefore, the "tenancy does not come to an end. That is the literal interpreta- "tion of the section."

In the present case, after the Rent Act, 1957, became law, but not before, the premises the subject-matter of this action were released from the exclusion from the operation of the Landlord and Tenant Act, 1954, up till then given by section 43 (1) (*c*) of that Act, and they were then business premises within the Act's definition and fell within section 24 (1).

But section 24 (3) provides that, notwithstanding anything in subsection (1) of section 24, " (*b*) where, at a time when a tenancy "is not one to which this Part of this Act applies, the landlord gives "notice to quit, the operation of the notice shall not be affected "by reason that the tenancy becomes one to which this Part of "this Act applies after the giving of the notice." The facts of this case seem to me to fall entirely under that subsection if it is read literally. On that view, when the landlord gave the notice to quit on November 14, 1956, the tenancy was not one to which Part II of the Act applied; the operation of the notice was not affected, therefore, by reason that before it expired on November 16, 1957, the tenancy had become one to which Part II of the Act had come to apply after the giving of the notice.

That is the view urged on us by the argument for the landlord, and it is a view to which, I think, the language of the subsection commits one unless such a literal construction is not open to this court by reason of the previous decision of *Orman's* case.[27]

As both my Lords have pointed out, a literal construction may lead to anomalous and perhaps unintended results, but when a

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[26] [1955] 1 W.L.R. 248.

[27] Ibid.

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statute does produce clear and unambiguous language it scarcely seems open or desirable to endeavour to hold that it does not mean what it says.

The difficulty in the case is to decide whether the construction of subsection (3) (*b*) for which the landlord contends can now be accepted and held by this court. It may be that Devlin J. was restricting subsection (3) (*b*) to what he calls a division in character of the premises. But although Lord Goddard C.J. accepted that judgment he appears, when himself referring shortly to section 24 (3) (*b*), to treat the judge's view as an illustration only of the subsection's application.

I have felt real difficulty in arriving at a conclusion on this matter, particularly as Lord Cohen takes a different view from Lord Evershed M.R., but on the facts of this case, differing as they do from those in *Orman's* case,[27] and on the careful analysis of the reasoning in that case which Lord Evershed M.R. has made, I think this court is free to express its own construction of the subsection. If free, I would apply a literal construction to both section 24 (1) (as was done in *Orman's* case [27]) and section 24 (3) (*b*), and so doing, I would hold that the landlord's notice to quit was effective to terminate the tenancy. I would, therefore, allow the appeal.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Johnson, Weatherall & Sturt for Barugh & Wilkinson, Middlesbrough; Tarry, Sherlock & Co. for Cohen, Jackson & Scott, Stockton-on-Tees.*

E. D.

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[27] [1955] 1 W.L.R. 248.

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Nov. 4, 21.

Lord Parker C.J., Hilbery and Diplock JJ.

In re HASTINGS (No. 2).

Habeas Corpus—Criminal cause or matter—Successive applications—Refusal of application by Queen's Bench Divisional Court—Application renewed to Queen's Bench Divisional Court differently constituted—Based on same evidence and same grounds—Whether court entitled to entertain application—Applications to different judges of same Division—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2—*Habeas Corpus Act,* 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 6—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 63—*R.S.C., Ord.* 59, rr. 1 (*c*) *and* 14.

An applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again, on a renewed application made on the same evidence and the same grounds, by another Divisional Court of the same Division, as the decision of the Divisional Court is equivalent to the decision of all the judges of the Queen's Bench Division.

Quaere, whether an applicant has a right to apply successively from judge to judge of the same Division, other than during the vacation.

In re Cobbett (1845) 5 L.T.O.S. 130 applied.

Dicta of Lord Halsbury L.C. in *Cox* v. *Hakes* (1890) 15 App. Cas. 506, 514; 6 T.L.R. 465; *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* [1928] A.C. 459; 44 T.L.R. 632; and dicta of Denning L.J. in *Ex parte Chapple* (1950) 66 T.L.R. (Pt. 2) 932, 936 questioned.

APPLICATION for writ of habeas corpus.

On July 25, 1957, the applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on each count of an indictment containing five counts to which he had pleaded Not Guilty. The first count charged him with felony, larceny as a bailee, while the other counts were for misdemeanours, counts two, three and four charging false pretences and count five fraudulent conversion. Separate verdicts were returned in respect of each count.

The recorder, passing sentence, said: "Edward Thomas "Hastings, you have been convicted on the plainest evidence of "deliberate, calculated and systematic frauds. Those frauds "have not only affected companies well able to sustain loss but "have cruelly brought grave financial burdens on little men "which it will be difficult for them to bear. This is by no means "the first time you have been convicted of dishonesty. You are "a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective "training."

The recorder did not say "concurrent on each count" and the sentence endorsed on the indictment was merely "four years' "corrective training." That was also the sentence entered on the calendar for the session of the court and on the warrant of commitment sent to the Governor of Walton Prison where the applicant was detained.

The applicant was given leave to appeal against conviction to the Court of Criminal Appeal in respect of the first and two other counts. On December 18, 1957, his appeal was heard and in the result the count for felony was quashed, the appeal in relation to the two other counts being dismissed. There was no alteration in the sentence. Pearson J., who gave the judgment of the court, stated expressly that, although leave to appeal against sentence had not been asked for, the sentence was in the view of the court reasonable and there would be no reason for interfering with it on any view.

The applicant applied for a writ of habeas corpus directed to the governor of Walton Prison and to the Home Secretary on the ground, inter alia, that only one general sentence had been passed on him and that, since the conviction on the first count had been quashed, there was no lawful sentence upon him in existence and he was not lawfully detained.

The application was heard by a Divisional Court consisting of Lord Goddard C.J., Streatfeild and Slade JJ. on March 7, 1958,[1] but the writ was refused, the court holding that, as a matter of construction, the words used by the recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant appealed from that decision to the Court of Appeal who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction.[2]

On October 24, 1958, the applicant made a fresh application for the writ (on this occasion directed to the Governor of H.M. Prison, Wandsworth, where he was then detained) to a Divisional Court consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges. The court, being of opinion that there was an arguable point, gave leave to move but subject to the court being satisfied that they had jurisdiction to hear and were bound to hear a fresh application. The fresh application was made on exactly the same grounds and on the same evidence as in the previous application.

On November 4, 1958, the Solicitor-General took objection to the hearing of the fresh application by the Divisional Court on the ground that it had no jurisdiction to do so.

Sir Harry Hylton-Foster Q.C., S.-G. and *Rodger Winn* for the governor of the prison, on the question of jurisdiction. The applicant, having once applied for a writ of habeas corpus to the

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[1] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.

[2] The Times, July 29, 1958.

Divisional Court of the Queen's Bench Division and been refused, is not entitled to make a fresh application to that court on the same grounds. The object of applying to the Divisional Court is to ascertain the views of all the judges of the Division. An applicant, having once ascertained those views, may not seek to do so again. Before the Supreme Court of Judicature Act, 1873, an applicant for a writ of habeas corpus who had applied to a single judge and been refused was not debarred from going before the full court sitting in banc, because he was entitled to the views of the whole court, but there is no authority to show that once he had gone before the court sitting in banc he was entitled to go back again. The effect of the Judicature Act, 1873, was to substitute the operation of the Divisional Court for the activities of the court sitting in banc and to transfer to the Divisional Court business which before the Act would properly have been dealt with by the court sitting in banc. That included applications for the writ of habeas corpus. [Reference was made to sections 39, 40 and 41 of the Supreme Court of Judicature Act, 1873.]

[LORD PARKER C.J. That is not conclusive. The question is, does the Divisional Court consist of the judges there sitting, or does it represent all the judges sitting in banc?]

It is submitted that the modern Divisional Court is a judicial unit which represents all the judges of the Division. It may be the accident of judicial business which decides how the court is made up at any particular time, but the clear indication of section 41 of the Act of 1873 is that it was intended to take the place of the court sitting in banc. If that were not so it is difficult to see how the collective view of the judges of the Division could be ascertained. Parliament must have intended, in passing the Act of 1873, to provide some court to which a person could go to ascertain that collective view. On the basis of that statute the Divisional Court is that court. The Supreme Court of Judicature (Consolidation) Act, 1925, throws no further light on this matter.

[DIPLOCK J. referred to the Order in Council of December 16, 1880. Presumably before the common law courts were amalgamated an applicant could go to the Divisional Court of each of the three common law Divisions in turn?]

It is conceded that an applicant always had a right to go from court to court, and that is still true at the present day. The effect of the amalgamation which took place in 1880 was to reduce the number of courts to which an applicant could go.

[Lord Parker C.J. referred to the Habeas Corpus Act, 1679.]

The purpose of that statute was to make habeas corpus available for bail where persons were detained in custody in criminal or supposed criminal matters, and to extend the jurisdiction in habeas corpus matters: see section 10. The effect of section 2 was to give power to a single judge to entertain applications for habeas corpus in the vacation, but it appears that in term time such applications were to be made to the court.

[Lord Parker C.J. Is the principle that an applicant can apply from judge to judge the result of any statute?]

It may be that it derives from the principle inherent in the common law on the basis that a refusal to issue the writ results in there being no res judicata. But a judge of the High Court is at all times bound by the decision of the totality of the judges of the court of which he is a member. Once, therefore, before the Judicature Act, 1873, the whole court had given its decision, the applicant had no further right as far as that court was concerned. Equally, once the modern Divisional Court has decided the matter, its decision binds all the judges of the Division. One thing is plain. Successive applications for the writ of habeas corpus should not be used as a means of appeal. That would be the effect if an applicant were entitled, having once been refused the writ by a Divisional Court, to go to another Divisional Court to seek a reversal of that refusal.

As to the authorities, *Ex parte Partington*,[3] which was referred to by Lord Halsbury L.C. in *Cox* v. *Hakes*,[4] supports the proposition, which is not denied, that an applicant for the writ of habeas corpus was entitled to the view of the whole court and was not debarred from obtaining it because he had already applied to a single judge and been refused the writ. In *Cox* v. *Hakes* in the Court of Appeal [5] there is a passage in the judgment of Lord Esher M.R.[6] which supports the view that the right of the applicant was only to go from court to court. Admittedly there is a dictum in Lord Halsbury's speech [7] in the House of Lords which, if taken literally, would seem to mean that a judgment of one court could in no sense bar an applicant from applying to another judge or composition of judges of the same court, but the dictum was obiter and was not followed by any of the other members of the House. Apart from the dictum of Lord Halsbury, that case supports the view that the existing right of the applicant was to go from court to court. As to *Eshugbayi Eleko* v. *Officer Administering the Territory of Nigeria*,[8] which appears to be adverse to this submission, that case is distinguishable because it concerned applications for writs of habeas corpus which had never been considered by any representative court but only by single judges in succession, and the speech of Lord Hailsham L.C.[9] should be read against that background. The Judicial Committee was not invited to advise on an application for habeas corpus on which a representative court had already reached a conclusion, still less to consider whether an applicant is entitled to go back to what is in effect the same court as that which has already refused the writ. *Eleko's* case [10] is persuasive authority, but see *The State* (*Dowling*) v. *Kingston* (*No. 2*),[11] a decision of the Irish Court of Appeal, which decided that no right to go from judge to judge seriatim in term time ever existed and that, once a judge has declared the law, it is binding upon the members of the whole court: see in particular the judgment of Fitzgibbon J.,[12] with which Sullivan C.J.[13] expressly agreed. It is not necessary for the purposes of the present case to argue that the decision in *Eleko's* case [14] is wrong and should not be followed and that the decision of the Irish Court of Appeal [15] should be preferred, but it may be necessary some day for the Crown so to argue. There is authority in Dominion courts for the propositions now contended for, namely, that a second application for the writ of habeas corpus cannot be made to the same court on the same grounds, and that the applicant is entitled to go from court to court but not from judge to judge: see *Ex parte Bouvy* (*No. 2*) [16] and *In re Loo Len* (*No. 2*).[17]

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[3] (1845) 13 M. & W. 679.

[4] (1890) 15 App.Cas. 506; 6 T.L.R. 465.

[5] Sub nom. *Ex parte Cox* (1887) 20 Q.B.D. 1.

[6] Ibid. 13.

[7] 15 App.Cas. 506, 514.

Neil Butter for the applicant. The application is made to the members of the Divisional Court as judges of the High Court or as judges of the Queen's Bench Division. The fact that an application upon similar grounds has been rejected by other judges sitting in a Divisional Court of the Queen's Bench Division is irrelevant. There is nothing to prevent an application for habeas corpus being renewed. The right to go from judge to judge as well as from court to court has long been recognised and, whatever its origins, it has become part and parcel of the common law. It was expressly referred to by Pollock C.B. in *Ex parte Partington*[18] and by Parke B. in *In re Cobbett.*[19] It is true that Parke B. said in that case[19]: "You have been heard once; "we cannot enter into this matter again," but it is submitted that that was because the previous application had been heard by the Court of Exchequer sitting in banc, so that a decision of literally all the judges of that court had therefore been obtained.

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[8] [1928] A.C. 459; 44 T.L.R. 632.

[9] [1928] A.C. 459, 468.

[10] [1928] A.C. 459.

[11] [1937] I.R. 699.

[12] Ibid. 738.

[13] Ibid. 728.

[14] [1928] A.C. 459.

[15] [1937] I.R. 699.

[16] (1900) 18 N.Z.L.R. 601.

[17] [1924] 1 D.L.R. 910.

The clearest authority in support of the applicant's right to make a fresh application is to be found in the *Eleko* case.[20] That was impliedly accepted by the Court of Appeal in *In re Carroll.*[21] Lord Halsbury's speech in *Cox* v. *Hakes*[22] recognised the right of an applicant to go from judge to judge, and that was approved by Lord Shaw in *Secretary of State for Home Affairs* v. *O'Brien.*[23] The belief that such a right exists is shared by textbook writers: see, for example, Short and Mellor, The Practice of the Crown Office, 2nd ed. (1908), p. 320, and Griffits' Guide to Crown Office Practice, 1947, p. 113. Moreover, there are numerous decisions of courts in the Dominions in which the right has been applied in practice. [Reference was made to *Ex parte Byrne*[24]; *In re Bowack*[25]; *Ex parte Rowlands*[26]; *Rex* v. *Carter*[27]; *In re Baptiste Paul (No. 2)*[28]; *Rex* v. *Jackson*[29]; *Rex* v. *Gee Dew.*[30]]

The State (Dowling) v. *Kingston (No. 2)*[31] was an Irish decision, and the decision of the Judicial Committee in *Eleko's* case[32] should be preferred by this court. If the argument of the Solicitor-General is correct, it would appear to follow that, if an application for habeas corpus were refused by a single judge of the Queen's Bench Division sitting in open court, the applicant would be barred from applying for the writ to any other judges of that Division. That cannot be right: the overall effect of the authorities is to show that, so far as habeas corpus is concerned, a single decision of a Divisional Court of the Division is not final. The applicant is entitled to be heard again.

Sir Harry Hylton-Foster Q.C., S.-G., in reply, referred to R.S.C., Ord. 59, r. 1 (*c*). If the applicant's submission were correct the rule would be ultra vires. [Reference was also made to a dictum of Denning L.J. in *Ex parte Chapple.*[33]]

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[18] (1845) 9 Jur. 92, 93; 13 M. & W. 679.

[19] (1845) 5 L.T.O.S. 130.

[20] [1928] A.C. 459.

[21] [1931] 1 K.B. 104.

[22] 15 App.Cas. 506, 514.

[23] [1923] A.C. 603; 39 T.L.R. 638.

[24] (1883) 22 N.B.R. 427.

[25] (1892) 2 B.C. 216.

[26] (1895) 16 N.S.W.L.R. 239.

[27] (1902) 5 Can.Cr.Cas. 401.

[28] (1912) 7 D.L.R. 25.

[29] (1914) 15 D.L.R. 545.

[30] [1924] 3 D.L.R. 153.

[31] [1937] I.R. 699.

[32] [1928] A.C. 459.

Cur. adv. vult.

November 21. LORD PARKER C.J. The judgment which I am about to read is the judgment of the court, in the preparation of which we all collaborated.

In these proceedings Mr. Butter moves for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Wandsworth Gaol undergoing a sentence of four years' corrective training, with a view to his being discharged. The ground of the application is that no valid sentence has ever been passed on him. [His Lordship stated the facts and continued:]

The Solicitor-General has contended first that, contrary to what has been generally presumed, an applicant has never had a right to go, as it is said, from judge to judge except when the court is not sitting. Secondly, and in the alternative, that though prior to the Judicature Act, 1873, an applicant could go from court to court, for example, from the Court of Queen's Bench to the Court of Common Pleas, yet, at any rate since 1880, when by Order in Council the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court were fused, an applicant who has been to a Queen's Bench Divisional Court has exhausted his rights in regard to all the judges of the Queen's Bench Division.

It is undoubtedly assumed today to be the law that an applicant for a writ of habeas corpus in a criminal matter—and we are only dealing with criminal matters—can apply to every judge in turn. In *Cox* v. *Hakes*,[1] one of the leading authorities on habeas corpus, Lord Halsbury L.C. said[2]: "For a period "extending as far back as our legal history, the writ of habeas "corpus has been regarded as one of the most important safe-"guards of the liberty of the subject. If upon the return to that "writ it was adjudged that no legal ground was made to appear "justifying detention, the consequence was immediate release "from custody. If release was refused, a person detained might "—see *Ex parte Partington*[3]—make a fresh application to every "judge or every court in turn, and each court or judge was bound

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[33] (1950) 66 T.L.R. (Pt. 2) 932, 936.

[1] (1890) 15 App.Cas. 506; 6 T.L.R. 465.

[2] 15 App.Cas. 506, 514.

[3] (1845) 13 M. & W. 679, 684.

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"to consider the question independently and not to be influenced "by the previous decisions refusing discharge." Again, in the more recent case before the Judicial Committee of *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*,[4] Lord Hailsham L.C. said[5]: "If it be conceded that any judge has jurisdiction "to order the writ to issue, then in the view of their Lordships "each judge is a tribunal to which application can be made "within the meaning of the rule, and every judge must hear the "application on the merits. It follows that, although by the "Judicature Act the courts have been combined in the one High "Court of Justice, each judge of that court still has jurisdic-"tion to entertain an application for a writ of habeas corpus in "term time or in vacation, and that he is bound to hear and "determine such an application on its merits notwithstanding that "some other judge has already refused a similar application."

Further, in *Ex parte Chapple*,[6] Denning L.J. said: "In the "year 1679, when the writ of habeas corpus was given its modern "efficiency, Parliament conferred the power of issuing it, not "only on the judges of the King's Bench, who had theretofore "issued it, but also on the Lord Chancellor, the Lord Keeper, "the judges of the Common Pleas, and the Barons of Exchequer. "Indeed, section 10 of the Habeas Corpus Act, 1679, provides: "'That it shall and may be lawful to and for any prisoner and "'prisoners as aforesaid, to move and obtain his or their habeas "'corpus as well out of the High Court of Chancery or Court of "'Exchequer, as out of the Courts of King's Bench or Common "'Pleas or either of them'; so that in those days a subject could "apply to any of the superior courts of the realm to issue a writ "of habeas corpus. Not only was the subject entitled to apply "for the writ, but the judges themselves were obliged to issue it in "proper cases and were subject to severe penalties if they did not "do so. If any court or judge refused to issue it, the applicant "had no right to appeal to a higher court, but he could go from "court to court and from judge to judge without being met by a "plea of res judicata."

The Solicitor-General, however, points out that the views of Lord Halsbury L.C.[7] and of Denning L.J.[8] were expressed obiter, and that the case of *Eleko*,[9] though persuasive authority, is not binding on this court. He accordingly asks us to look at the matter afresh.

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[4] [1928] A.C. 459; 44 T.L.R. 632.

[5] [1928] A.C. 459, 468.

[6] (1950) 66 T.L.R. (Pt. 2) 932.

[7] 15 App.Cas. 506, 514.

[8] 66 T.L.R. (Pt. 2) 932, 936.

[9] [1928] A.C. 459.

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We think that it is clear that, at any rate since the end of the eighteenth century, an applicant has always had the right to apply successively to every tribunal competent to issue a writ of habeas corpus. The problem thus involves ascertaining first what tribunals had that power before the passing of the Judicature Act, 1873, and, secondly, upon what tribunals that power has devolved as a result of that Act and its successors, in particular, the Judicature Act, 1925.

In considering the early history of the matter it is relevant to bear in mind that the common law courts of King's Bench, Common Pleas and Exchequer functioned as courts only in term time, and that each of the four legal terms was of brief duration. Consequently, the greater part of the year fell during the legal vacations, although the judges of the courts might be sitting under commissions of assize, oyer and terminer and general gaol delivery or hearing cases in Middlesex at nisi prius. Furthermore, each of the common law courts sat in banc and no individual judge of the court had any general power to act for the court. Even a decision at nisi prius only became a judgment of the court upon motion to the court upon the fourth day of the term next following the verdict at nisi prius.

The position prior to the passing of the Habeas Corpus Act, 1679, is far from clear. It is noteworthy, however, that in the statute 16 Car. 1, c. 10, it was provided as follows: "That if any "person shall hereafter be committed, restrained of his liberty, "or suffer imprisonment, by the order or decree of any such "court of Star-Chamber, or other court aforesaid, now or at any "time hereafter, having or pretending to have the same or like "jurisdiction, power or authority to commit or imprison as "aforesaid, or by the command or warrant of the King's "Majesty, his heirs or successors, in their own person, or by "the command or warrant of the council-board, or of any of the "Lords or others of His Majesty's Privy Council; that in every "such case every person so committed, restrained of his liberty, "or suffering imprisonment, upon demand or motion made by his "counsel, or other employed by him for that purpose, unto the "judges of the Court of King's Bench or Common Pleas, in open "court shall, without delay, upon any pretence whatsoever, for the "ordinary fees usually paid for the same, have forthwith granted "unto him a writ of habeas corpus, to be directed generally "unto all and every sheriffs, gaoler, minister, officer, or other "persons in whose custody the party committed or restrained "shall be, and the sheriffs, gaoler, minister, officer, or other "person in whose custody the party so committed or restrained "shall be, shall at the return of the said writ, and according to "the command thereof, upon due and convenient notice thereof "given unto him, at the charge of the party who requireth or "procureth such writ, and upon security by his own bond given, "to pay the charge of carrying back the prisoner, if he shall be "remanded by the court to which he shall be brought, as in like "cases hath been used, such charges of bringing up and carrying "back the prisoner to be always ordered by the court, if any "difference shall arise thereabout, bring or cause to be brought "the body of the said party so committed or restrained unto and "before the judges or justices of the said court from whence the "said writ shall issue, in open court, and shall then likewise "certify the true cause of such his detainer or imprisonment, and "thereupon the court, within three court-days after such return "made and delivered in open court, shall proceed to examine "and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall "thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner; and if any thing shall "be otherwise wilfully done or omitted to be done by any judge, "justice, officer or other person aforementioned, contrary to the "direction and true meaning hereof, that then such person so "offending shall forfeit to the party grieved his treble damages, "to be recovered by such means, and in such manner as is "formerly in this Act limited and appointed for the like penalty "to be sued for and recovered."

The reference is always to the judges sitting as a court and an open court and not to them as individual judges. This was an Act to extend the right to the writ of habeas corpus, not to diminish the rights to it previously enjoyed by the subject. If before the passing of this Act the subject had had any recognised right to apply to each individual judge in turn or to an individual judge without having to apply to the judges sitting as a court, it is difficult to suppose that the Act would have been framed in the terms in which we find it enacted.

The Court of King's Bench unquestionably had the power to issue the writ of habeas corpus ad subjiciendum in criminal and supposed criminal matters in term time. It appears from the judgment of Blackstone in *Wood's* case [10] that the Court of Common Pleas had by 1679 successfully asserted a similar general power, originally by making use of the legal fiction that the applicant was a party to a current suit in the Common Pleas, a fiction that was dropped after the passing of the Habeas Corpus Act, 1640. The Court of Exchequer had not, by 1679, acquired any general power to issue the writ, but made use of it in the case of persons genuinely privileged to be sued only in the Court of Exchequer. There appears to be no trace, however, of any of these courts exercising the power to issue the writ except in term time and upon motion to the court sitting in banc.

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[10] (1761) 2 W.Bl. 744.

According to the views of Coke and of Hale the writ could issue out of Chancery in term time or in vacation, although Lord Nottingham L.C. in *Jenkes's* case [11] took the contrary view, a decision which has been described as being the cause of the passing of the Act of 1679.

The Act of 1679 was a procedural Act. It applied only to persons detained for criminal or supposed criminal matters and was directed specifically to the abuse of detaining persons in prison without bail and without bringing them to trial. So far as is relevant to the present inquiry it did two things which had much wider consequences: (1) by section 10 it provided that in criminal or supposed criminal matters the High Court of Chancery and the Court of Exchequer as well as the Courts of King's Bench and Common Pleas should have power to issue the writ of habeas corpus ad subjiciendum; and (2) by section 2 it provided that in criminal or supposed criminal matters any judge of those courts could, in vacation, act for the court of which he was a member, and if upon return of the writ he found the case was bailable, release the prisoner on his recognisances to take his trial in the Court of King's Bench the term following, or at the next assize sessions or general gaol delivery to be held in the place where the offence of which the prisoner was charged was cognisable.

The powers conferred by this Act upon single judges were thus limited in three respects, first as to the type of case in which they could be exercised, namely, criminal and supposed criminal matters, secondly, as to the powers of the judge, namely, to bail the prisoner, and thirdly, as to the time in which they could be exercised, namely, in vacation.

It seems that by the middle of the eighteenth century the first two limitations upon the powers of a single judge had ceased to operate in practice. By 1758 the Court of King's Bench treated the writ of habeas corpus as issuable, in all cases not merely criminal and supposed criminal cases, by a single judge in vacation, and the power of the judge upon the return as extending to discharging and not merely to bailing the prisoner. (See *Rex* v. *Shebbeare*,[12] *Rex* v. *Mead*,[13] *Rex* v. *Clarke*.[14]) This was no doubt a natural extension of the statutory power, since if the judge on the return of the writ in a supposedly criminal case was to find that it was not a criminal case and that the detention was unlawful it would not be consonant with the libertarian views of common lawyers in the eighteenth century that the prisoner should not be ordered to be discharged.

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[11] (1676) 6 Howell's St.Tr. 89.

The Habeas Corpus Act, 1816, gave statutory recognition to these extensions of the powers of a single judge in vacation which had already been adopted by the Court of King's Bench and extended them to judges of the Common Pleas and the Exchequer. It also gave these judges and their respective courts in term time the power to inquire into the truth of the return. It did not apply to the Court of Chancery, which was slower to assert the general power to issue writs of habeas corpus except as authorised by the Act of 1679, but in *Crowley's* case [15] in 1818 Lord Eldon, after an elaborate examination of the history of the matter, held that the Lord Chancellor had the general power to issue writs of habeas corpus in term or in vacation.

But while the limits on the powers of a single judge of the common law courts granted by the Act of 1679 were in these two respects swept away by the practice of the King's Bench Court in the eighteenth century and finally by the Act of 1816, there is no suggestion that we can find in the cases or the writings of lawyers that the third limitation, namely, that a single judge could issue the writ in vacation only was ever impinged upon. Thus in Chitty's Criminal Law, 2nd ed. (1826), vol. 1, p. 124, it is stated that it "must be obtained by motion "to the court in term time, and by application to a judge in "vacation." The practice is also so stated in the judgment of Abbott C.J. in *Hobhouse's* case.[16] We think it is established that in term time the writ was issuable only by the court sitting in banc. Except in vacation a single judge had no power to do so.

There is no doubt that in term time an applicant could go from court to court, that is, from King's Bench to Common Pleas, from Common Pleas to Exchequer, from Exchequer to

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[12] (1758) 1 Burr. 460.

[13] (1758) 1 Burr. 542.

[14] (1758) 1 Burr. 606.

[15] (1818) 2 Swanst. 1.

[16] (1820) 3 B. & Ald. 420, 422.

Chancery, and it may well be that in vacation he could go from judge to judge even of the same court. But it appears clear that he could not apply twice to the same court on the same facts, for while the decision whether or not to issue a writ of habeas corpus is not a judgment so that there is no res judicata it is not a writ of course (*Hobhouse's* case[16]) and the decision whether or not to issue it involves the exercise of a judicial discretion. The court must have an inherent jurisdiction to refuse, having once exercised its discretion, to hear the same matter argued again. Thus in *In re Cobbett*[17] an application had been refused by the Court of Queen's Bench and again by the Court of Exchequer. It was then made a second time to the Court of Exchequer when Parke B. in the course of the argument said[18]: "You have been heard once: we cannot enter into this matter "again."

The common law courts, as we have already mentioned, prior to the Judicature Act, 1873, sat in banc, all members of the court available in London sitting together although there might on occasions be absentees. But the decision was the decision of the court, and there is no suggestion to be found in any of the cases that the absence of one or more members would enable an applicant to apply again to the same court when it was differently constituted.

What, then, is the historical foundation for the dictum of Lord Halsbury in *Cox* v. *Hakes*?[19] He refers to *Ex parte Partington*,[20] in which an application for the writ had been refused by the Court of Queen's Bench. The application was renewed before and refused by the Chief Baron, and was then renewed before the Court of Exchequer. Parke B., in giving the judgment of the court refusing the application, said this[21]: "The defendant, "however, has a right to the opinion of every court as to the "propriety of the imprisonment, and therefore we have thought "it proper to examine attentively the provisions of the statute "[i.e., under which the applicant was in custody] without con- "sidering ourselves as concluded by these decisions. But we are "all of opinion that the defendant is not entitled to his discharge, "and we entirely agree in the judgment of the Court of Queen's "Bench, which was approved of by the Chief Baron, and are "satisfied of the correctness of the reasons stated to us to have "been assigned by Lord Denman for that judgment."

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[16] 3 B. & Ald. 420.

[17] (1845) 5 L.T.O.S. 130.

[18] Ibid.

[19] 15 App.Cas. 506, 514.

[20] 13 M. & W. 679; (1845) 9 Jur. 92.

[21] 13 M. & W. 679, 684.

Parke B., therefore, was only expressly affirming the right to go from one court to another. That the application to the Chief Baron was made in vacation is not expressly stated, but it was anyhow made in chambers, and in view of what we have already indicated as to the practice, we think it reasonably certain that it was made in vacation. In the report of the case in 9 Jurist, however, there appears an interjection of Pollock C.B., to whom the previous application had been made, in these words [22]: "Yes, "and of every judge," meaning that a person is entitled to take the opinion of every judge. This interjection is quite consistent with its being a reference to what might take place in vacation, and we think that it must have been so intended.

In re Cobbett [23] was decided in the same year. In the course of that case, in addition to the observations to which we have already referred, Parke B. said [23]: "You can go to another "court in which you have not been heard. I believe this matter "has been heard in the Queen's Bench as well as here, but as it "is an application for a habeas corpus, you are entitled to the "judgment of each court and of each judge; and therefore you "may go to the Court of Common Pleas. If this was the only "court in which you could be heard we might then, perhaps under "the circumstances, rehear the case."

There is here the only other pre-Judicature Act reference that we can find to an applicant's being entitled to the judgment of each judge, but here again, Parke B. may be referring only to the time when the court is not sitting.

In *Cox* v. *Hakes* in the Court of Appeal under the title *Ex parte Cox*,[24] Lord Esher M.R. said [25]: "It was argued that, if "such an appeal lies, a prisoner would be deprived of the privi- "lege which he had under the old practice of applying, where his "application for a habeas corpus was refused by one judge, to "all the other judges in succession. It is not correct to say that "under the old system there could be an application to all the "judges in succession. There could be an application to all "the courts in succession." It is true that the decision of the Court of Appeal was reversed by the House of Lords,[26] but none of their Lordships dissented from Lord Esher's statement, unless it be Lord Halsbury in the observations to which we have already referred.[27] It is to be observed that neither Lord Bramwell nor Lord Herschell subscribed to Lord Halsbury's observations. Lord

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[22] 9 Jur. 92, 93.

[23] 5 L.T.O.S. 130.

[24] (1887) 20 Q.B.D. 1.

[25] Ibid. 13.

[26] 15 App.Cas. 506.

[27] Ibid. 514.

Bramwell said[28]: "However, as has been said, we have got on "without such appeals hitherto, and might continue to do so and "thrive. I say 'without such appeals,' for, with all respect, I "cannot agree that going first to a judge of one court, and then, "on being refused by the judge, going to a court, and, on being "refused by one court, going to another, was or is an appeal. "The court applied to after refusal by a judge or other court "was not exercising an appellate jurisdiction in entertaining the "application. It was exercising a primary jurisdiction. It need "not have heard of the former application, nor known of the "materials on which it was founded; and, indeed, those before "it might be different from the former. If, indeed, such a "proceeding was an appeal that appeal exists still. Clearly, "where the first application is to a single judge, and where to the "High Court, the Lord Chancellor could grant the writ refused "by them on application to him, and vice versa. Whether if one "division of the High Court, before the Queen's Bench, Common "Pleas, and Exchequer Divisions were fused, had refused the "writ, then another Division would have been bound to entertain "an application for one, I know not. If yes, then the Judicature "Act left the matter as it was before. Anyhow, there is the "possibility of a second application now as of right, so that there "is the less need for an express appeal to supply the want of "being able to try more than one tribunal."

Lord Herschell said[29]: "It will be convenient, before proceeding to an examination of the section of the Judicature Act "upon which this case turns, to state briefly the mode in which "the courts have administered the law in relation to that writ. "It was always open to an applicant for it, if defeated in one "court, at once to renew his application to another. No court "was bound by the view taken by any other, or felt itself obliged "to follow the law laid down by it. Each court exercised its "independent judgment upon the case, and determined for itself "whether the return to the writ established that the detention "of the applicant was in accordance with the law. A person "detained in custody might thus proceed from court to court "until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ "that he was entitled to be discharged, his right to his liberty "could not afterwards be called in question."

Lord Watson agreed with Lord Bramwell and Lord Herschell, and Lord Macnaghten agreed with Lord Herschell. Lord Field,

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[28] 15 App.Cas. 506, 523, 524.

[29] Ibid. 527, 528.

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who dissented, said[30]: "In support of this argument it was "correctly stated, as some of the noble and learned Lords who "have addressed your Lordships have already pointed out, that "at the time of the passing of the Act it was the undoubted right "of a subject detained in custody to question by habeas the lawfulness of his detention before every one of Her Majesty's courts "in succession, without regard to the refusal to discharge by any "one or more of them; and that if any one court came to the "conclusion that the applicant was entitled to be discharged, no "other court had any power of modification or reversal."

It is all the more noteworthy that their Lordships confined themselves in this way to the right of going from court to court, having regard to their experience prior to the Judicature Act. Lord Bramwell had been a Baron of the Court of Exchequer from 1856, Lord Esher had been a justice of the Court of Common Pleas since 1868, and Lord Field had been a justice of the Court of Queen's Bench.

Again, in *Secretary of State for Home Affairs* v. *O'Brien*,[31] Lord Birkenhead says[32]: "In the course of time certain rules "and principles have been evolved; and many of these have been "declared so frequently and by such high authority as to become "elementary. Perhaps the most important for our present "purpose is that which lays it down that if the writ is once "directed to issue and discharge is ordered by a competent court, "no appeal lies to any superior court. Correlative with this rule, "and markedly indicative in itself of the spirit of our law, is that "other which establishes that he who applies unsuccessfully for "the issue of the writ may appeal from court to court until he "reaches the highest tribunal in the land."

So far we venture to think that the authorities cannot be said to support the principle that except in vacation an applicant could go from judge to judge as opposed to going from court to court. Nor can we trace any single instance in the books of application being made to successive judges of the same court. The only real authority to the contrary appears to be *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*,[33] to which we have already referred. Two considerations seemed to have influenced the Judicial Committee in that case: (1) that it would be curious if an applicant could by reason of the Act of 1679 renew his application before each judge in vacation, whereas in term he could make it once to the Court of Chancery and once to each of the three courts of common law. We have dealt with the historical evidence in its favour, but is this so curious? An applicant is entitled to the opinion of the full court. In vacation he cannot obtain that and so he was given the right to go from judge to judge. (2) That since by reason of the Judicature Act, 1873, there is only one court, the Supreme Court of Judicature, an applicant by reason of that Act would only be able to make one application, namely, to the Supreme Court, unless he also had the right to go from judge to judge.

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[30] 15 App.Cas. 506, 543.

[31] [1923] A.C. 603; 39 T.L.R. 638.

[32] [1923] A.C. 603, 609.

[33] [1928] A.C. 459.

This second reason brings us to an examination of the Judicature Acts, but before doing so we would mention that in *The State* (*Dowling*) v. *Kingston* (*No.* 2),[34] there is to be found a most illuminating judgment of FitzGibbon J. (with whom Sullivan C.J. agreed) which considers *Eleko*[35] in great detail and gives, we think, cogent reasons for thinking that Lord Hailsham may have gone too far in that case.

The Judicature Act, 1873, by section 3, united into one Supreme Court of Judicature the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer and other courts not relevant to the present matter. By section 16 the jurisdiction of all these courts and the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any one or more of the judges of those courts sitting in court or chambers or elsewhere, was transferred to the High Court of Justice. There was thus transferred to the High Court of Justice any jurisdiction to issue writs of habeas corpus previously vested in the common law courts and in the individual judges of those courts. Section 23 provided that, subject to the Act and rules made thereunder, the transferred jurisdiction should be exercised as nearly as maybe in the same manner as it might have been exercised by the respective courts from which the jurisdiction had been transferred. Section 26 abolished the division of the legal year into terms, and gave the High Court power to sit at any time. Provisions for vacations and sittings in vacation were made by sections 27 and 28, but the new vacations, unlike the old, were not periods during which the common law courts were not in general able to function. Section 31 set up five divisions of the High Court, namely, Chancery, Queen's Bench, Common Pleas, Exchequer and Probate, Divorce and Admiralty; but section 32 authorised the Queen in Council to order the reduction or increase in the number of divisions. It was under this power that the three common law divisions were combined into a single Queen's Bench Division by Order in Council in 1880.*

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[34] [1937] I.R. 699.

[35] [1928] A.C. 459.

Section 39 conferred upon single judges of the High Court such jurisdiction as was previously exercisable by single judges of the former common law courts and such other jurisdiction of the High Court as might be directed or authorised to be so heard by Rules of Court, while section 40 provided that such causes and matters as were not proper to be heard by a single judge should be heard by Divisional Courts. Further, by section 41 it was provided as follows: " Subject to any rules of court and in the meantime " until such rules shall be made, all business belonging to the " Queen's Bench, Common Pleas, and Exchequer Divisions " respectively of the said High Court, which, according to the " practice now existing in the superior courts of common law " would have been proper to be transacted or disposed of by the " court sitting in banc, if this Act had not passed, may be trans- " acted and disposed of by Divisional Courts, which shall, as " far as may be found practicable and convenient, include one " or more judge or judges attached to the particular Division of " the said court to which the cause or matter out of which such " business arises has been assigned; ".

At this stage, therefore, the position was that subject to any rules of court a single judge of the Queen's Bench Division sitting in court or chambers could exercise in relation to writs of habeas corpus any jurisdiction which could formerly have been exercised by a single judge of any of the three common law courts, while a Divisional Court of each of the three common law divisions could exercise the jurisdiction of the former common law courts sitting in banc. The effect of the Order in Council in 1880 was that the Queen's Bench Division became the successor of the three Courts of Queen's Bench, Common Pleas and Exchequer sitting in banc, the only differences being that any two or more judges sitting as a Queen's Bench Divisional Court should constitute and be the court sitting in banc. That being so, we think that after 1880 an applicant for habeas corpus who had been heard by a Queen's Bench Divisional Court and refused, if he applied again to a Queen's Bench Divisional Court upon the same evidence was in the same position as an applicant before 1873 who made a second application to the same common law court, and could be met with the objection with which the applicant was met in *In re Cobbett*[36]: "You have been heard "once: we cannot enter into this matter again."

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* Order in Council for Reducing the Number of the Divisions of H.M. High Court of Justice, etc., December 16, 1880.

The Judicature Act, 1925, did not re-enact the express provisions of section 41 of the Act of 1873 as to the powers of the former common law courts sitting in banc being exercisable only by Divisional Courts. Section 63, however, provided that Divisional Courts might be held for the transaction of any business in the High Court ordered by rules of court to be heard by a Divisional Court and that Divisional Courts for the purpose of the matters to be heard by them should exercise all or any part of the jurisdiction of the High Court, which included all the jurisdiction formerly exercised by the three common law courts. Finally, by R.S.C., Ord. 59, rr. 1 and 14, the jurisdiction of the High Court in relation to habeas corpus was directed to be exercised either by a single judge or by a Divisional Court.

We do not think that this altered the position of a Queen's Bench Divisional Court when sitting to hear applications for habeas corpus. It still is the successor of the three common law courts sitting in banc, its decision is equivalent to the decision of all the judges of the division just as the decision of one of the old common law courts sitting in banc was the equivalent of the decision of all the judges of that court.

We know of no case since 1880 in which an application based on the same grounds and the same evidence has been renewed before a Divisional Court consisting of different judges of the Queen's Bench Division. Nor are there to be found any dicta in support of the making of such an application unless it be in *Ex parte Chapple*[37] in which Denning L.J. said[38]: "The only "remedy of the subject is to go before another Divisional Court "or another judge. . . ." It may be that he was referring to a Divisional Court of another Division, but if he meant a Divisional Court of the Queen's Bench Division consisting of different judges we think that he was wrong.

We hold, therefore, that the applicant, having already once been heard by a Divisional Court of the Queen's Bench Division, is not entitled to be heard again by another Divisional Court of the same Division.

That is sufficient to dispose of the present case. Although it has been necessary for the purpose of ascertaining the nature of the jurisdiction exercised today by the Divisional Court in matters of habeas corpus to canvass the historical justification

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[36] 5 L.T.O.S. 130.

[37] 66 T.L.R. (Pt. 2) 932.

[38] Ibid. 936.

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for the view expressed by the Judicial Committee in *Eleko's* case,[39] it is not necessary for the decision of the present application for us to express any concluded opinion as to the extent of an applicant's right today to go from judge to judge as distinct from going from Divisional Court to Divisional Court of the Queen's Bench Division. *Eleko's* case [39] has remained unquestioned—except in the Irish case [40] to which we have referred—for 30 years, and there are parallel decisions in Canadian and Australian courts. In a matter so important to the liberty of the subject we would not lightly disregard the principles there laid down and their correctness can be left for consideration until a case arises in which they are directly in point.

We would only repeat, in conclusion, what Lord Goddard has so often said, that there should be an appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. This case is just the case in which a ruling by the highest tribunal in the land is required.

Application dismissed.

Solicitors: *Treasury Solicitor; Official Solicitor.*

E. M. W.

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[39] [1928] A.C. 506.

[40] *The State (Dowling)* v. *Kingston (No. 2)* [1937] I.R. 699.

1958 *Dec.* 16.

Lord Parker C.J., Cassels and McNair JJ.

In re HUNT.

Contempt of Court—Committal order—Litigant in person—Whether privileged from arrest—Civil contempt.

Arrest—Privilege from—Court precincts—Litigant in person—Civil contempt.

On a motion by defendants for committal of the applicant as plaintiff in the action for contempt of court in failing to attend an appointment before an examiner of the court, pursuant to R.S.C., Ord. 42, r. 32, the applicant defended himself in person and the judge ordered him there and then to be committed and he was arrested in court and taken to Brixton Prison. He applied for a writ of habeas corpus, claiming that he had been wrongfully arrested on the ground, inter alia, that he was privileged from arrest while he was in court to conduct his case in person:—

Held, that the only privilege from arrest that existed in the circumstances was a privilege of the court to ensure that justice was done by preventing anyone properly before the court from being arrested, and that the application failed.

Cameron v. *Lightfoot* (1778) 2 Wm.Bl. 1189, 1190; *In re Evans* [1893] 1 Ch. 252 applied.

Application for habeas corpus.

On November 4, 1958, Allied Bakeries Ltd. brought a motion before Wynn-Parry J. to commit the applicant, Kenneth Douglas Hunt, to Brixton Prison for contempt of court in failing to attend an appointment before an examiner of the court. Hunt defended the motion in person. The judge, being of the opinion that the applicant had no intention of attending any examination that might be fixed, ordered him there and then to be committed to Brixton Prison. The applicant applied for habeas corpus on the ground (inter alia) that he was privileged from arrest while in court to conduct his case in person.

The applicant, appearing in person, submitted on the substantive point that his arrest on November 4 was wrongful because he was privileged from arrest within the precincts of the court as a litigant in person necessarily before the court involved in ordinary contempt which was civil, waivable and involving no misconduct.

Rodger Winn for the Governor of Brixton Prison. It is on the return to the writ that the legality of a committal is discussed: *Reg.* v. *Board of Control, Ex parte Rutty.*[1] A person committed by a court of record for contempt cannot obtain his discharge by habeas corpus except where the commitment was bad in law: *Hamond* v. *Howell.*[2] The applicant's claim to privilege is clearly based on the one-time privilege of the Court of Chancery: see the Consolidated Orders in Chancery, 1860, Ord. 42, r. 1. This, however, is not a personal privilege, but a privilege of the court, and it is the court which evokes it or not as it sees fit: *Cameron* v. *Lightfoot.*[3] [*In re Evans*,[4] *Hobern* v. *Fowler*[5] and *In re Freston*[6] were also referred to.] There is no reason to doubt that the Court of Chancery had power to deal with a witness or suitor by ordering immediate arrest by the tipstaff. The privilege was one which the court would insist upon so that its own business might be performed efficiently. There is no authority which in any way restricts the power of the court to order committal: *In re Johnson.*[7] But it is a contempt of a court and an infringement of its privilege if any person who has to attend before it is arrested otherwise than by the will of the court itself. A party can rely on the court in its discretion to protect him in order that justice may be done, but if he puts himself out of court, namely, by being in contempt of the court, he cannot rely on the court's privilege, and the court itself can always arrest any suitor before it who has thrown away his privilege to protection from the court. It is only where the court's privilege has been infringed that the court, or some other court acting for it, will declare that the arrest was wrongful. [Reference was made to Daniell's Chancery Practice (1901), vol. 1, 7th ed., pp. 721 and 723; *In the matter of Clarke*,[8] and Chitty's Archbold's Practice (1885), vol. 2, pp. 1484 and 1487.]

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[1] [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822.

[2] (1674) 1 Mod. 184.

[3] (1778) 2 Wm.Bl. 1189, 1190.

[4] [1893] 1 Ch. 252.

[5] (1893) 62 L.J.Q.B. 49.

[6] (1883) 11 Q.B.D. 545.

Bernard Gillis Q.C., appearing with *W. Denny* for Allied Bakeries Ltd., accepted and associated himself with the submissions made on this point by counsel for the governor.

LORD PARKER C.J. The applicant, Kenneth Douglas Hunt, was committed on November 4, 1958, to Brixton Prison for contempt in disobeying an order of the court. He now applies to this court in person for a writ of habeas corpus. He has raised every conceivable point, but there is no doubt that the one which has been developed at greatest length, and the one with which this court is really concerned, goes to the question whether he was properly arrested.

There was a motion by certain defendants, Allied Bakeries Ltd., before Wynn-Parry J., to commit the applicant to Brixton Prison for contempt of court in failing to attend an appointment before an examiner of the court. The judge, having heard the case, came to the conclusion that the applicant, who was then the plaintiff in that action, had no intention of attending any examination that might be fixed, and he there and then ordered him to be committed to Brixton Prison; the tipstaff, who had arrived in court, arrested him and took him to prison. In those circumstances the applicant says he was wrongfully arrested, because he claims that he had some privilege from arrest while he was in the court. Apart from that point, he takes some four or five other points, all of which admittedly have been raised by him on an appeal to the Court of Appeal[1] from the judgment of

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[7] (1888) 20 Q.B.D. 68.

[8] (1842) 2 Q.B. 619.

[1] *Hunt* v. *Allied Bakeries Ltd.* (*No.* 2) [1959] 1 W.L.R. 50; [1959] 1 All E.R. 37

Wynn-Parry J. He says that some of the points were not dealt with by the Court of Appeal. That no doubt is so. If one reads the judgment it appears that point after point was taken before the Court of Appeal, as indeed they have been taken before this court. The fact that the Court of Appeal did not deal with all of them expressly does not mean that they had any doubt on the matter, because the appeal was dismissed; therefore every point he took before the Court of Appeal was decided, whether expressly or impliedly, against him. It may be, and I find it unnecessary to decide, that that decision of the Court of Appeal is res judicata in these proceedings, but whether it is or not, approaching the matter de novo and having heard all the arguments raised by the applicant, I see no reason, even if I am at liberty to do so, to come to any other view than that taken by the Court of Appeal. Accordingly, so far as all his points other than that concerning privilege from arrest are concerned, in my judgment the applicant completely fails.

This question in regard to the privilege from arrest is an interesting one. The applicant agrees that in the case of special contempt, which he would class as contempt in the face of the court and criminal contempt and matters of that sort, there is no privilege against arrest within the precincts of the courts; but he contends that when it is a case of ordinary contempt—merely of disobeying an order of the court—a litigant before the court has complete immunity from arrest while in the precincts of the court. Accordingly, he complains that he was wrongfully arrested in Wynn-Parry J.'s court, and that he is wrongfully detained in Brixton Prison.

I find it unnecessary to go through all the history of the matter. It seems to me clear that it is a misconception to talk about a litigant or a solicitor or a witness having immunity from arrest while within the precincts of the court. The truth of the matter is that the privilege, if privilege there be, is a privilege of the court to ensure that justice is done, and for that purpose to prevent anybody properly before the court from being arrested. That seems perfectly clear if one looks at one or two of the authorities. If one goes back to 1777 and 1778, it will be seen in *Cameron* v. *Lightfoot*[2] that this matter was fully dealt with, and De Grey C.J. said[3]: "The question therefore is, "whether the privilege of the King's Court, extended to suitors "redeundo, so vitiates an arrest, or suspends the operation of

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[2] (1778) 2 Wm.Bl. 1189, 1190.

[3] Ibid. 1192.

"the writ, that the taking a man thereon becomes an act of "trespass to the party taken. The ancient way of availing one-"self of the privilege of the courts was by suing out a writ of "privilege for suitors, jurors, and witnesses. But this privilege "is not considered as the privilege of the *person* attending the "court, but of the *court* which he attends." There the matter is being dealt with, as I have said, not as a privilege of the litigant, but as something which the court has power to do in order that there should be a proper administration of justice.

Again, in the Consolidated Orders in Chancery in 1860 it was provided by Order 42, r. 1: "Officers and attendants upon the "court, suitors and witnesses, are to have privilege eundo, "redeundo, et morando, for their necessary attendance, but not "otherwise; and where any of them are arrested at such times "of necessary attendance, it is a contempt of court." True, those Orders in Chancery were repealed in 1883, but it has always been assumed that, whether by reason of R.S.C., Ord. 72, r. 2, or, indeed, at common law, the rights that existed before 1883 remain.

It is also to be observed that in Chitty's Archbold's Practice (1885), vol. 2, p. 1484, the matter is put perfectly clearly. It reads: "Every person connected with a cause, and attending in "the course of it, whether compelled to attend by process or not, "such as parties, witnesses, bail, solicitors, etc., are privileged "from arrest whilst going to, attending, and returning from court, "or the judges' chambers." Then it provides that barristers have the same immunity. Then a little later on the page it says that it is not considered as the privilege of the person attending the court, but of the court which he attends, and at p. 1487 it is laid down that where an arrest has been made in court and complaint is made of that arrest, the complaint is made to the judge in question. It is perfectly clear from that that it is a privilege of the court, and in Daniell's Chancery Practice, 8th ed., vol. 1, pp. 776 and 777, it is provided, in much the same terms: "Officers and attendants upon the court, suitors, and witnesses "are to have privilege eundo redeundo et morando for their "necessary attendance, but not otherwise, and when any of them "are arrested at such times of necessary attendance it is a con-"tempt of court. A solicitor who is proceeding to the court to "attend to his professional business there pending is privileged "from arrest; and the question in such cases is, whether, at the "time of his arrest, he was bona fide proceeding in a direct line "to or from the court. The solicitor is also privileged if he is on

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"his way to attend an appointment at the offices of the court. "If the first arrest is bad, all the detainers lodged under it are "also bad. The application to discharge must be made to that "court of which the arrest is a contempt."

From those authorities and textbooks it seems to me clear, as indeed one would expect, that this so-called privilege from arrest is a power which every court has to see that justice is done in the court, and for that purpose that people properly in the court are not interfered with by being arrested and prevented from assisting the court and carrying on their business in the court. In so far as it is said to be a privilege of the persons attending the court, the privilege is no more than this, that they are entitled to rely on the judge of that court to see that justice is not interfered with by their being arrested. What is clear is that there is nothing to suggest that a person is privileged from arrest in a court if the arrest is done on the order of that court; indeed, it would be very surprising if that were not so. The truth of the matter is that certainly before 1893, as is shown by Mr. Registrar Lavie's note in *In re Evans*,[4] it had always been the practice for a person, though properly before the court, to be committed by the court and arrested in court, not only if he had been guilty of what is called special contempt, but also in the case of ordinary contempt. Accordingly, in my judgment, there is nothing in the applicant's point in regard to wrongful arrest. In these circumstances I would refuse this application.

I should perhaps add that I have deliberately avoided the debate as to how far this court sitting as a Divisional Court can inquire into matters of committal. It may be that the true view is, and I think the cases support it, that though this court always has power to inquire into the legality of the committal, it will not inquire whether the power has been properly exercised. However, in this case I am quite satisfied that the application fails.

CASSELS J. I agree.

McNAIR J. I also agree.

Application refused.

Solicitors: *Treasury Solicitor; A. Kramer & Co.*

J. D. P.

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[4] [1893] 1 Ch. 252, 259.

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Lord Parker C.J., Donovan and Ashworth JJ.

EALING CORPORATION *v.* JONES.

Town and Country Planning—Enforcement notice—Appeal—Notice quashed by court of summary jurisdiction—Whether local planning authority entitled to appeal to quarter sessions against decision—Whether "person aggrieved"—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 23 (5).

A court of summary jurisdiction, on an appeal under section 23 (4) of the Town and Country Planning Act, 1947, quashed an enforcement notice served by the local planning authority, which required discontinuance of the use of a site for parking motor-vehicles, on the ground that that use by the appellant of the site was a use before the appointed day, and that no planning permission was required. The authority appealed to quarter sessions, under section 23 (5) of the Act,[1] against the decision of the court of summary jurisdiction, and the appeals committee, taking the view that the local planning authority was a "person aggrieved" within the meaning of section 23 (5), allowed the appeal:—

Held, that, assuming that the words "any person" in section 23 (5) were capable of including a local planning authority, the authority in the present case was not a "person aggrieved" by the decision of the court of summary jurisdiction as no financial or legal burden had been placed upon it as a result of the decision; accordingly the authority had no right of appeal to quarter sessions under section 23 (5) and the appeal must be allowed.

Sevenoaks Urban District Council v. *Twynam* [1929] 2 K.B. 440; 45 T.L.R. 508, *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation* [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032 and *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow* [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78 applied.

Per curiam. If Parliament had intended the local planning authority to have a right of appeal from the decision of the court of summary jurisdiction under this section, it would have said so clearly and used words which placed the matter beyond all doubt and not the words "any person aggrieved," which the authorities showed was an ambiguous expression.

CASE STATED by the appeals committee of Middlesex Quarter Sessions.

By a notice of appeal given under section 23 (5) of the Town and Country Planning Act, 1947, the Ealing Corporation, the local planning authority, appealed against a decision of the justices for the petty sessional division of Brentford sitting at Ealing,

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[1] Town and Country Planning Act, 1947, s. 23: " . . . (5) Any person "aggrieved by a decision of a court "of summary jurisdiction under the "last foregoing subsection [subsec- "tion (4)] may appeal against that "decision to a court of quarter "sessions."

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quashing an enforcement notice served by the corporation on the appellant, John James Jones, on December 12, 1957, in so far as it related to the use of a site at 1388, Greenford Road, Ealing, for the parking of motor-vehicles. The following additional facts, which were not included in the case stated but which counsel agreed should be before the court, are taken from the judgments. By the enforcement notice the local planning authority required the discontinuance of the use of the site for the parking of motor-vehicles, the allegation being that its use for that purpose was contrary to planning control, whereas the appellant maintained that the use for that purpose was a use before the appointed day and, accordingly, that no planning permission was required. On that issue the justices held that the use was not a new use but one which had existed before planning control. On March 19, 1958, the appeals committee heard the local planning authority's appeal against the justices' decision quashing the notice.

It was contended by the appellant (the respondent to that appeal) that the local planning authority was not a " person " aggrieved " within the provisions of section 23 (5) of the Act of 1947 and that, therefore, the committee had no jurisdiction to hear the appeal.

The local planning authority contended that it was a " person " aggrieved."

The appeals committee were of opinion in the light of the authorities cited that the local planning authority was a " person " aggrieved " within section 23 (5). They accordingly heard and allowed the appeal. The question stated for the opinion of the court was whether their decision that they had jurisdiction was correct in law.

Brendan Shaw for the appellant. The position of the local planning authority in the present case is precisely the same as that of the local authority, the London County Council, in *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation.*[2] In that case the Divisional Court held that the local authority was not a " person aggrieved " within the meaning of section 64 of the London County Council (General Powers) Act, 1947, as a result of a decision of a court of summary jurisdiction reversing the council's decision to cancel a street trader's licence. *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*[3] and *Reg.* v. *Nottingham*

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[2] [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032.

[3] [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659.

Quarter Sessions, Ex parte Harlow[4] are distinguishable. In the *Surrey* case[5] the county council was held to be a "person "aggrieved" within the meaning of section 301 of the Public Health Act, 1936, by reason of a decision of a court of summary jurisdiction which had allowed an appeal against an order of the county council made under section 1 (1) of the Nurseries and Child Minders' Regulation Act, 1948, and in so doing had made an order for costs against the county council. In the *Nottingham* case[6] the Nottingham City Council was held to be a "person "aggrieved" within the meaning of section 301 of the Act of 1936 by reason of a decision of a court of summary jurisdiction quashing a notice served by the council on the occupier of a house requiring him to provide a dustbin. The reason for the decision in that case was that the effect of the court of summary jurisdiction's decision was to impose upon the Nottingham City Council a legal liability to provide a dustbin for the occupier's premises. It is submitted that the authorities establish that in the absence of an order for costs being made against a local authority or the imposition of any financial liability or legal burden arising out of a court's decision a local authority does not become a "person "aggrieved" merely because a decision of a court of summary jurisdiction has been given against it. The fact that the authority is annoyed or frustrated in carrying out its duties is not sufficient to make it a "person aggrieved." Here no order for costs was made against the local planning authority and no financial or legal burden has been imposed upon it as a result of the court's decision in relation to the use of this land.

On the construction of section 23 (5) of the Town and Country Planning Act, 1947, it is submitted that the word "person" does not include a local planning authority. Throughout the Act, wherever "person" is used it refers to somebody who is the subject of a decision or act of the local planning authority. On the other hand, wherever the Act confers powers and duties on a local planning authority it refers to it as the "local planning "authority." [Reference was made to sections 11 (1) (2), 14 (3) (*c*), 23 (1) and 24 (3).] In section 10 (3) the expressions "local planning authority" and "person" are used in contradistinction to each other. It may seem strange that a local planning authority should have no right of appeal on questions of fact from a decision of a court of summary jurisdiction, but it is difficult to envisage many cases where it would wish to appeal on fact where no burden is cast upon it as a result of the decision of that court. This is analogous to a criminal case. There is an appeal on a point of law by way of case stated. The appeal should be allowed.

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[4] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

[5] [1951] 2 K.B. 749.

[6] [1952] 2 Q.B. 601.

W. G. Wingate for the local planning authority. The present case cannot be compared with the *Westminster* case,[7] which concerned the licensing of street traders. This is a matter concerning the development of land and it is of public interest. In the *Westminster* case[7] the London County Council had no interest in the licensing, but here it is the duty and responsibility of the corporation as the local planning authority to preserve the development plan. Furthermore, the disruption of the plan might affect the rateable value of the district, and thus affect the interests of the local authority. Again, if, by reason of the decision of the court of summary jurisdiction, the local planning authority is unable to prevent the use of the land objected to, it may become necessary for it to act under section 26 of the Act, which might involve it in the payment of compensation and thus impose a financial burden on the authority. [Reference was also made to section 100 (2).]

If the appellant is right, the local planning authority must be content with the decision of the court of summary jurisdiction. Appeal by case stated is not always appropriate or convenient. This is not a criminal cause or matter and there is no presumption against there being a right of appeal on the facts.

[ASHWORTH J. The effect of section 100 is that the Minister can himself in certain circumstances serve an enforcement notice. If your argument is correct, the Minister could himself be a "person aggrieved" by a decision of a court of summary jurisdiction.]

That is a possible construction of the section. As to the construction of section 23 (5), the court should not accept the very narrow interpretation of "person aggrieved" submitted for the appellant. The fact that the draftsman has merely used "person aggrieved" and not "any person or local planning "authority aggrieved" does not necessarily mean that the local planning authority has no right of appeal. Parliament may have considered that this point was not likely to arise. "Person" should be read to include "local planning authority." The court should not seek to restrict the meaning of "person," which in its natural and ordinary meaning, covers a local authority. [Reference was made to the Interpretation Act, 1889.]

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[7] [1951] 2 K.B. 508.

[LORD PARKER C.J. The court will not express any concluded opinion on whether "person" covers a local authority. For the purposes of your argument the question is whether the local planning authority in the present case was "aggrieved."]

It is submitted that the local planning authority clearly comes within the rule relied on by Lord Esher M.R. in *Ex parte Official Receiver, In re Reed, Bowen & Co.*,[8] cited by Lord Hewart C.J. in *Sevenoaks Urban District Council* v. *Twynam*.[9] If the ground for the decision in the *Sevenoaks* case[10] can be relied on, the local planning authority is entitled to the judgment of this court. Reliance is also placed on the words of Parker J., delivering the judgment of the court in *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow*,[11] that "prima facie a local authority who has "either gone to a court of summary jurisdiction as plaintiff, or "has been brought before such a court as defendant to a complaint and has failed, is, one would have thought, in common "parlance, a person aggrieved." That is plainly right, and the cases where it has been held to the contrary were decided on their own facts and under different statutes. It is preferable to decide de novo what "person aggrieved" means in this statute. Approaching this matter without considering other statutes the conclusion should be reached that the local planning authority is a "person aggrieved," that is to say, it has been prejudiced or put under embarrassment. It is conceded that to be "aggrieved" the authority must be more than annoyed. The appeal should be dismissed.

Brendan Shaw replied.

LORD PARKER C.J. This is an appeal by way of case stated by the appeals committee of Middlesex Sessions before whom Ealing Corporation, the local planning authority, appealed from a decision of the petty sessional division of Brentford, who had quashed an enforcement notice served by the corporation on one John James Jones. The point raised is the question, which comes only too frequently before this court, as to what is meant by the term a "person aggrieved" in a statute. [His Lordship stated the facts and continued:] Section 23 of the Town and Country Planning Act, 1947, provides for the serving of an enforcement notice on the owner or occupier of land where the local planning authority consider that the user is in breach of planning control. Subsection (4) of that section provides: "If any person on whom "an enforcement notice is served under this section is aggrieved "by the notice, he may, at any time within the period mentioned "in the last foregoing subsection, appeal against the notice to "a court of summary jurisdiction . . ." Pausing there, it will be seen that the powers of the court of summary jurisdiction are severely limited because the subsection goes on to provide: "and on any such appeal the court—(*a*) if satisfied that per-"mission was granted under this Part of this Act for the "development to which the notice relates, or that no such "permission was required in respect thereof, or, as the case "may be, that the conditions subject to which such permission "was granted have been complied with, shall quash the notice "to which the appeal relates; . . ." By subsection (5): "Any "person aggrieved by a decision of a court of summary juris-"diction under the last foregoing subsection may appeal against "that decision to a court of quarter sessions."

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[8] (1887) 19 Q.B.D. 174.

[9] [1929] 2 K.B. 440, 446; 45 T.L.R. 508.

[10] [1929] 2 K.B. 440.

[11] [1952] 2 Q.B. 601, 605.

Accordingly, two points arise; first, whether the words "any "person" in subsection (5) are words which, in their context, cover the local planning authority; and, secondly, whether, assuming they are capable of including the local planning authority, it can be said that "any person aggrieved" covers the case of a local planning authority whose enforcement notice has been quashed on the ground that the alleged development was a development for which no permission was required.

As to the first, whether a local planning authority can come within the expression "any person" in this Act, we have been referred to a number of sections where it is true that a local planning authority is always specifically referred to in contrast to a person. On the other hand, it is to be observed that "any "person" appears in subsection (5) of section 23 as opposed to the words in subsection (4): "If any person on whom an enforce-"ment notice is served." It is also relevant to observe that the local planning authority under the statute may have to go to court and sue. An instance of that is section 24 itself, when one would expect if costs were given against it that it would be able to claim that it was an aggrieved person. I find it unnecessary, however, to come to a final conclusion on that point, and I will assume for the purposes of this appeal that the words "any person" are capable in the section of including a local planning authority.

Coming, therefore, to the second question, whether the local planning authority could be said to be aggrieved in the present case, I would like to make two general observations. First, I would like to voice a protest that Parliament continues to allow this expression to come into Act after Act of Parliament. As long ago as 1929, Lord Hewart C.J., in *Sevenoaks Urban District Council* v. *Twynam*,[1] referred to the fact that these words were so often used, and that if one looked at the cases, one would find some cases going one way and some the other. Notwithstanding that, the words continued to creep in after that date and continue to do so today. This is another case where Parliament has failed to make clear what was really intended by those words.

The second general observation I would like to make is that so far as I know, and so far as counsel in the case know, this is the first case in which a local planning authority has claimed to have the right to appeal to quarter sessions under section 23. But that does not, of course, mean that it may not have the right.

As Lord Hewart C.J. pointed out in *Sevenoaks Urban District Council* v. *Twynam*[2]: "But as has been said again and again "there is often little utility in seeking to interpret particular "expressions in one statute by reference to decisions given upon "similar expressions in different statutes which have been "enacted alio intuitu. The problem with which we are concerned "is not, what is the meaning of the expression 'aggrieved' in "any one of a dozen other statutes, but what is its meaning in "this part of this statute?" Accordingly, I only look at the cases to which we have been referred to see if there are general principles which can be extracted which will guide the court in approaching the question as to what the words "person "aggrieved" mean in any particular statute.

It seems to me easier to say what will not constitute a person aggrieved than it is to say what "person aggrieved" includes. It is clear from the cases that a person aggrieved is not a person who is disappointed or annoyed at the decision. As was said by Lord Goddard C.J. in *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation*[3]: "Another case which has some, "though not very direct, bearing on the matter is *Reg.* v. "*Keepers of the Peace and Justices of the County of London*,[4] "where the question was raised whether the prosecutor in a

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[1] [1929] 2 K.B. 440; 45 T.L.R. 508.

[2] [1929] 2 K.B. 440, 443.

[3] [1951] 2 K.B. 508, 511; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032.

[4] (1890) 25 Q.B.D. 357.

" quasi-criminal case, a matter affecting a highway, was a person " aggrieved, and the court held that a prosecutor was never a " person aggrieved. It was put that he might be annoyed at " finding what he thought was a breach of the law was not a " breach of the law."

It is also clear that a person is not aggrieved when that person being a public body has been frustrated in the performance of one of its public duties. The argument was advanced in that same case, the *Westminster* case,[5] on behalf of the Westminster Corporation in these terms: " The corporation have a public " administrative duty to perform in the regulation of the streets; " and, having been interfered with in the execution of that duty " by the decision of the magistrate, they are persons aggrieved " by his order within the meaning of section 64 of the Act. It is " submitted that Parliament intended that the words ' persons " ' aggrieved ' in the section should be read in their widest sense, " and that they would clearly include persons who were frustrated " in the performance of a public duty." That argument was not acceded to in that case. Accordingly, I am satisfied that a mere annoyance that what was thought to be a breach of planning control turned out not to be a breach of planning control and, equally, the mere fact that this authority, charged with certain duties under the Act, has been frustrated in the performance of what it thought was its public duty, are not, of themselves, considerations sufficient to make the local planning authority an aggrieved person. Approaching it from the other end, what is included in the words " person aggrieved "? If costs have been awarded in a case against a local authority, it is clear on the authorities that the local authority would be an aggrieved person. Equally, if the result of the decision has been to put some legal burden on the public body concerned, that has been held to make it a person aggrieved. In that connection I would only mention *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow*,[6] where this court held that the decision of the magistrates that the owner of premises was not obliged to provide a dustbin involved that " the council is left with a legal " burden which, if the order of the court of summary jurisdiction " had not been made, the council would have discharged "[7]; in other words, the burden would have fallen upon the council to provide a dustbin.

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[5] [1951] 2 K.B. 508, 509.

[6] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

[7] [1952] 2 Q.B. 601, 605.

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In the present case, in the first place, there has been no question of costs. In the second place, in my view, the effect of the decision has not been to put a burden in the sense of a financial burden on the local planning authority. It is true that the authority may be affected by the decision in some way in regard to rateable values, and it may be it will be affected if it chooses hereafter to take steps under section 26, which would involve compensation, but in my view those contingencies are too remote to enable one to say within the principles laid down that the local planning authority is a "person aggrieved."

Finally, I confess that looking at the statute alone one cannot help feeling that if Parliament had intended the local planning authority to be able to appeal it would have said so clearly. As Ashworth J. pointed out in the course of the argument, by section 100 the Minister himself can, if he thinks it is expedient, serve an enforcement notice, "and any notice so served by the "Minister shall have the like effect as a notice served by the "local planning authority." Accordingly, if the argument for the local planning authority is correct it would have the surprising result that the Minister himself could be said to be a person aggrieved by the decision of the court of summary jurisdiction. In my judgment, the appeals committee of Middlesex Sessions was wrong in law and this appeal should be allowed.

Donovan J. I agree. I think it is true that if one came to the expression without reference to judicial decision one would say that the words "person aggrieved by a decision" mean no more than a person who had had the decision given against him; but the courts have decided that the words mean more than that, and have held that the word "aggrieved" is not synonymous in this context with the word "dissatisfied." The word "aggrieved" connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something, and so on, and I cannot see that that is so here. The local planning authority has simply been told that it cannot enforce the discontinuance of the present use of this land by the appellant by means of an enforcement notice under section 23. It has been told, in other words, that the appellant here has and always has had the right to go on using the land in the way in which he at present uses it, and so for the present the development plan must be modified. I say "at present" because there are provisions under sections 26 and 27 of the Act whereby the planning authority can, in effect, overcome the magistrates' decision. It is not necessarily, therefore, even frustrated, and I think the existence of this alternative power of control tends to support the view that Parliament did not think it necessary to confer on planning authorities a right of appeal from the magistrates' decision. It is quite true that compensation may have to be paid if the planning authority does exercise its powers under section 26, but that burden would not flow—immediately at any rate—from the magistrates' decision but from a subsequent administrative decision of the planning authority.

It is said by Mr. Wingate that this is a very important matter. Planning authorities have important public duties cast upon them and he argues that that, in itself, tends to support the view that they have a right of appeal from the magistrates' decision. I agree that the matter is important, but when this Act was passed in 1947 there were numerous decisions of the court available which show that the expression "person aggrieved" is ambiguous. It has caused a great deal of trouble and there are decisions on it both ways. In those circumstances, one might reasonably think that if Parliament wanted to confer a right of appeal on the local planning authority because this matter is so important, it would have used words which placed the matter beyond all doubt as it has done, for example, if I may be forgiven the reference, in sections 61 and 64 of the Income Tax Act, 1952, where the position of the subject and the public authority in relation to an appeal from an inferior tribunal is made perfectly clear. I also think that there is force in the argument that almost invariably in this Act the local planning authority is called by that name, and I think a better view to take is that Parliament would have done so in section 23 (5) if it had intended the local planning authority to have a right of appeal from the magistrates. Like the Lord Chief Justice, I am also impressed by the point made during the argument on section 100 by Ashworth J.

ASHWORTH J. Although I confess that this case has caused me more doubt than appears to have affected my brethren, I have arrived at the same conclusion and I have nothing I can usefully add.

Appeal allowed.

Solicitors: *A. V. Hawkins & Co., Harrow; E. J. Cope-Brown, Town Clerk, Ealing Borough Council.*

E. M. W.

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Jenkins,
Romer and
Pearce L.JJ.

CORNISH *v.* BROOK GREEN LAUNDRY LTD. AND OTHERS.

[Plaint No. N. 1672.]

Landlord and Tenant—Equitable tenancy—Holding over under agreement—Agreement subject to condition precedent—Condition unfulfilled by tenant—Whether an equitable tenancy.

County Court—Jurisdiction—Landlord and tenant—Application for new tenancy of business premises—Incidental question whether tenant entitled to specific performance—Premises over £500 *in value—Rateable value less than* £500*—Landlord and Tenant Act,* 1954, *s.* 63 (2).

Landlord and Tenant—Business premises (security of tenure)—" Competent landlord "—Tenant and mesne landlord holding over under Act of 1954*—Whether " competent landlord "—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30, 44 (1), *Sch. VI* (1).

Before 1949 B. G. Ltd. (the "landlords") and Mrs. P., predecessor in title of Mrs. C. (the "tenant") had occupied business premises, Nos. 23a and 23 respectively, as tenants of the Westminster estate trustees. In 1949 the trustees granted to the landlords a lease of both premises for seven years from Michaelmas; the landlords granted to Mrs. P. a sublease of No. 23 for a like period less three days, to which the tenant succeeded. After the coming into force of the Landlord and Tenant Act, 1954,[1] both

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[1] Landlord and Tenant Act, 1954, s. 30: " (1) The grounds on which a " landlord may oppose an application " under subsection (1) of section 24 of " this Act are such of the following " grounds as may be stated in the " landlord's notice under section 25 " of this Act or, as the case may be, " under subsection (6) of section 26 " thereof, that is to say:— . . . " (*g*) subject as hereinafter provided, " that on the termination of the " current tenancy the landlord intends " to occupy the holding for the purposes, or partly for the purposes, " of a business to be carried on by " him therein, or as his residence. " (2) The landlord shall not be " entitled to oppose an application on " the ground specified in paragraph " (*g*) of the last foregoing subsection " if the interest of the landlord, or " an interest which has merged in " that interest and but for the merger " would be the interest of the landlord, was purchased or created after " the beginning of the period of five " years which ends with the termination of the current tenancy, and at " all times since the purchase or " creation thereof the holding has " been comprised in a tenancy or " successive tenancies of the description specified in subsection (1) of " section 23 of this Act."

S. 44 (1): " . . . in this Part " of this Act the expression 'the " 'landlord', in relation to a tenancy " (in this section referred to as 'the " 'relevant tenancy'), means the " person (whether or not he is the " immediate landlord) who is the " owner of that interest in the property comprised in the relevant " tenancy which for the time being " fulfils the following conditions, that " is to say—(*a*) that it is an interest " in reversion expectant (whether " immediately or not) on the termination of the relevant tenancy, and " (*b*) that it is either the fee simple " or a tenancy which will not come " to an end within fourteen months " or less by effluxion of time or by parties held over under the protection of the Act. In January, 1957, the trustees offered to the landlords a new lease of No. 23 for 10½ years, subject to their carrying out certain repairs, which offer was accepted in writing.

The landlords then offered to the tenant a sublease of No. 23a, which she refused on the ground that the accommodation was too small. On October 30, 1957, the tenant applied to the county court under the provisions of the Act of 1954 for the determination of the terms of a new sublease of No. 23. The landlords opposed the application on the grounds that pursuant to section 30 (1) (*g*) they required to occupy the premises themselves, and that pursuant to section 30 (1) (*d*) they had offered suitable alternative accommodation; they first stated that they held an equitable tenancy of the premises under the agreement of January, but later stated in the alternative that they were tenants under the lease of 1949 as continued by the Act of 1954. Under advice, and with the temporary concurrence of the Westminster trustees, they deferred the execution of the prescribed repairs. The annual value of the premises was over £500.

The county court judge held that the landlords were holding under an equitable tenancy (on the principle of *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9) arising from the agreement of January, 1957, and so could not rely on section 30 (1) (*g*) as their interest had arisen within five years. He also held that the alternative accommodation was insufficient, and granted the tenant a sublease of No. 23.

The landlords appealed; the tenant cross-appealed, alleging that they were not a "competent landlord" within the meaning of the Act:—

Held, allowing the appeal, (1) that the tenure of the landlords was a holding-over from the lease of 1949 by virtue of the Act of 1954 and not an equitable tenure arising out of the agreement of 1957, as the necessary condition precedent of executing the prescribed repairs had not been complied with, so that the landlords were not excluded from relying on section 30 (1) (*g*); the principle in *Walsh* v. *Lonsdale* (supra) did not apply where an agreement for a lease was subject to a condition precedent which had not been fulfilled and had not been waived by the lessor.

Inland Revenue Commissioners v. *Earl of Derby* [1914] 3 K.B. 1186 approved.

(2) That the landlords were a "competent landlord" within the meaning of Schedule VI (1) to the Act, and as such entitled to oppose the grant of a new tenancy.

(3) That the county court judge was right in exercising jurisdiction under section 63 (2) of the Act of 1954, notwithstanding the

"virtue of a notice to quit already "given by the landlord, and is not it- "self in reversion expectant (whether "immediately or not) on an interest "which fulfils those conditions."

Sch. VI: "(1) . . . 'the competent "'landlord' means the person who in "relation to the tenancy is for the "time being the landlord (as defined "by section 44 of this Act) for the "purposes of Part II of this Act."

provisions of the County Courts Acts, although the value of the premises exceeded £500, as he was not required to enforce any equitable right, but merely to decide whether or not such a right existed.

Foster v. *Reeves* [1892] 2 Q.B. 255 distinguished.

APPEAL from Judge Blagden, sitting at Westminster County Court.

The facts are taken substantially from the judgment of the court.

This was an appeal by the respondents, Brook Green Laundry Ltd. (hereinafter called "Brook Green") against an order of Judge Blagden dated May 22, 1958, whereby it was ordered that a new tenancy should be granted to the applicant, Mrs. Cornish, of the premises, 23, Lower Belgrave Street, Eaton Square, in the County of London. The tenancy directed by the said order to be granted was to be for a period of 10½ years less three days from Michaelmas, 1956, at a rent of £250 per annum from that date.

The premises, No. 23, Lower Belgrave Street, consisted of a ground floor and basement, and this accommodation had been occupied by Mrs. Cornish and by her mother (a Mrs. Paulin) before her for some 50 years for the purpose of a confectioners', newsagents', stationers' and tobacconists' shop. The premises immediately adjoining No. 23, and also consisting of a ground floor and basement, were known as No. 23a, Lower Belgrave Street and were and had for some years past been occupied by Brook Green.

The owners of the freehold interest in both 23 and 23a, Lower Belgrave Street were the trustees of the Westminster settled estates (hereinafter referred to as "the trustees"). Before 1949 Mrs. Paulin held a direct tenancy of No. 23 from the trustees, but in that year the trustees granted a lease to Brook Green of both 23 and 23a for seven years from Michaelmas 1949. On May 10, 1950, Brook Green granted an underlease of No. 23 to Mrs. Paulin for the term of their own lease less the last three days. Accordingly, Brook Green's contractual lease of No. 23a expired on September 29, 1956, and the sublease of No. 23 (then vested in Mrs. Cornish) expired three days earlier. As, however, Brook Green were using No. 23a for business purposes, they became entitled in respect of their tenancy to the protection of Part II of the Landlord and Tenant Act, 1954, as also did Mrs. Cornish in view of her user of No. 23 as a shop. The result of this protection was to continue both the lease and the sublease until they were superseded by new tenancies or determined by appropriate notices served under the Act. Both Brook Green and Mrs. Cornish continued in occupation of their respective premises, and in November, 1956, certain tentative correspondence passed between them or their respective solicitors as to the granting of a further sublease to Mrs. Cornish on the assumption that Brook Green would obtain a new headlease from the trustees. Apart from this correspondence, no step was taken by any of the parties concerned until January 18, 1957, when the trustees' solicitors wrote to Brook Green enclosing a formal offer of a new lease. Some of the terms of the offer, which was partly printed and partly written, so far as material, were as follows: "Dear Sirs, 23, "Lower Belgrave Street. In answer to your application, we "hereby, on behalf of the special executors of the late Duke of "Westminster, make the following offer, namely, subject to your "first carrying out the works specified in the schedule hereto, "without prejudice to the obligation that the rent and covenants "under the headlease should be duly paid and performed up to "its expiration, a reversionary lease would (subject as after men-"tioned and to your written acceptance of these terms within the "time after specified) be granted to your company of No. 23, "Lower Belgrave Street, London, upon the following terms: "(1) The term of years to be 10½ years from Michaelmas Day, "1956, to Lady Day, 1967." Then after a reference to a cash payment, "the rent, as from September 29, 1956, to be £400 a "year. . . . (3) The property to be leased subject to all rights, "easements and privileges of adjacent or neighbouring premises, "and the lease also to contain all such clauses and covenants as "are contained in a form marked (blank) dated January, 1957, "indorsed No. 23, Lower Belgrave Street and sent herewith for "perusal and return." Then by clause 5: "Your company to "carry out and complete the works mentioned in the schedule "hereto to the satisfaction in all respects of the lessors or their "estate surveyor by March 25, 1957, and thereupon and upon "payment of the costs above mentioned the lease to be granted "and taken up by your company." Then by clause 6 it was provided: "These terms (which are not transferable) are open to "your company's acceptance in writing, by affixing the company's "seal with the usual formalities to the acceptance subjoined "and returning this form to us within three weeks from this "date." The schedule of works required were: "(1) Make "good the pieces of broken parapet oversailing course on the front "elevation of the premises. (2) Carry out such sanitary works "(if any) as may be necessary." Then the form of acceptance which appeared below and was filled in and dated February 4, 1957, and sealed by Brook Green, was: "We hereby accept the "foregoing offer and agree to carry out the said works, to take "up the lease upon tender thereof and to pay the costs as "mentioned."

The subsequent history of the matter down to the commencement of the present proceedings sufficiently appeared from the correspondence which passed between the solicitors acting respectively for Brook Green (Messrs. Goodman, Derrick & Co.), Mrs. Cornish (Messrs. Beddington, Hughes & Hobart), and the trustees (Messrs. Boodle, Hatfield & Co.). On February 12, 1957, Brook Green's solicitors wrote to Mrs. Cornish's solicitors: "Dear Sirs, 23, Lower Belgrave Street. Further to our letter "of November 28 last, our clients are in process of negotiating a "new headlease of these premises, but the negotiations are not "yet complete. In view of the fact that your client's lease will "already have expired, we would suggest that she remain in "possession for the time being as a monthly tenant but other-"wise on the terms of the existing lease." On April 9, 1957, Brook Green's solicitors wrote to the trustees' solicitors: ". . . Further to our letter of 21st ultimo, our clients have "now considered this matter further, and at their request we "enclose herewith the original agreement which has been duly "signed. . . ."

On May 13, 1957, Brook Green's solicitors wrote to Mrs. Cornish's solicitors: ". . . We refer to our correspondence of "February last, and should state that our clients are still in "course of carrying out various negotiations in respect of the "renewal of their headlease. The headlease will in fact be back "dated to the expiration of the old one in September last, and "we feel therefore that we should mention to you that any fresh "arrangements entered into with your clients should take this "into account." On June 25, 1957, the trustees' solicitors wrote to Brook Green's solicitors: "We now enclose the draft lease for "your final perusal," and after a reference to insurance, the final paragraph says: "If the schedule of condition mentioned in "clause 3 has now been agreed between the surveyors for our "respective clients, you might be so kind as to insert its date "and let us have a copy which can be signed by us on behalf "of our clients." On July 4 there was a letter from Brook Green's solicitors to Mrs. Cornish with reference to alternative accommodation.

On July 8 Brook Green's solicitors wrote to the trustees' solicitors saying, inter alia: "In the meantime we enclose "herewith a copy of the schedule of condition, which we "understand has been agreed by the surveyors to both parties, "and you will no doubt wish to confirm this." On July 12 Mrs. Cornish's solicitors wrote to Brook Green's solicitors: "We refer "to your letter of the 4th instant and have now taken instructions. Our client feels that she could not carry on her business "in the part of the premises occupied by your clients and in these "circumstances we should be glad to have your proposals for a "new lease of the premises at present occupied by our client. "We have, solely for the protection of our client's interests and "not as any hostile step, served notice on the Duke of Westminster as the competent landlord for the purposes of Part II "of the Landlord and Tenant Act, 1954, and enclose a copy of "that notice for your information. When sending the notice "to the Duke, we have informed him that we are in negotiation "with you and that the notice is served only for the purpose of "protecting the interests of our client."

On August 1 Mrs. Cornish's solicitors wrote to Brook Green's solicitors: "We should be glad if we might hear from you on this "matter. You will recall that you told us that your client had "agreed with the freeholder terms for the grant of a new lease "and it is, of course, desirable that we should similarly conclude "terms with you having regard to the period fixed by the Act." On August 9 Brook Green's solicitors replied: "We refer to your "letter of the 12th July in this matter. We acknowledge receipt "of a copy of a notice served on the Duke of Westminster. We "would suggest, with great respect, that this notice is misconceived. Our clients' tenancy includes the part of the "premises occupied by them as well as the part sublet to your "client. As our clients' tenancy is continued automatically by "section 24 (1), and no statutory notice has been served either "by our clients or by the head landlords, our clients have a "reversion (section 65 (1)) expectant on your client's tenancy; "nor will their tenancy come to an end within fourteen months "or less by effluxion of time or by virtue of a notice to quit "already given by the landlord. Our clients are therefore 'the "'landlord' under section 44. If you agree with this point of "view, would you let us know whether you want us to treat the "notice as if it had been served on our clients or whether you "propose to serve a fresh notice. Meanwhile we are instructed

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"to offer your client formally, by way of alternative accommodation, the accommodation at present occupied by our clients for "a term of 10½ years (less 10 days) from September 29, 1956, "or from such other day as may become appropriate under the "provisions of the Act at a rent of £150 per annum exclusive "with full interior repairing obligations and otherwise on the "same terms as your current tenancy. Our clients propose to "occupy the accommodation now occupied by your client."

On August 19 Mrs. Cornish's solicitors wrote to Brook Green's solicitors: ". . . We refer to your letter of the "9th instant, but cannot accept your view that our notice "is misconceived." Then after certain other matters the last paragraph of the letter was: "Inasmuch as it appears "from your letter that your clients now have a new lease "of the whole of the premises, we shall be glad if you will "say whether they are prepared to grant to our client a "new tenancy of the part of the premises comprised in the "present tenancy of our client, for the term mentioned in your "letter under reply." On September 12 the trustees' solicitors wrote to Brook Green's solicitors: "We now enclose the counterpart of the new lease for sealing on behalf of your client company and we also enclose a note of our charges and disbursements in connection with the preparation and completion of the "lease. . . . You will remember that it was one of the conditions "precedent to the grant of the lease that your client should "carry out certain works. We have asked the estate surveyor to "let us know whether sufficient of these have been completed "to enable the lease to be granted and as soon as we have heard "from him we will communicate with you again."

On September 17 Mrs. Cornish's solicitors wrote to Brook Green's solicitors inquiring about the date of the lease or other instrument under which Brook Green now held the premises and the term thereof, and stating: "Having regard to the information "which you furnished to us, it would appear to us that the "interest of your clients in the premises must have been "'created' within five years and we should be glad if you would "let us know whether you agree." The reply was that "Our "clients hold the premises by virtue of an agreement for lease "dated January 18, 1957, for a term of 10½ years from Michaelmas Day, 1956, to Lady Day, 1967. We trust this is the "information that you require."

On October 30, 1957, Mrs. Cornish made an application under the Act of 1954 asking for the grant of a new tenancy of No. 23, Lower Belgrave Street, pursuant to Part II of the Act. Originally the only respondents to the application were Brook Green, but on October 28, 1958, she joined the trustees as additional respondents. The trustees, however, took no active part in the proceedings. Paragraph 3 of the amended application was as follows: "The following are particulars of the termination of "the current tenancy: On July 12, 1957, the applicant requested "a new tenancy to commence on June 24, 1958, and on September 12, 1957, the first respondents gave notice that they would "oppose any application for the grant of a new tenancy."

On December 3, 1957, Brook Green put in an answer opposing Mrs. Cornish's application on the ground that on the termination of the current tenancy they intended to occupy No. 23 for the purpose of their business as a laundry to be carried on by them therein, and on the further ground that they had offered and were willing to provide Mrs. Cornish with, or secure the provision of, suitable alternative accommodation within the meaning of section 30 (1) (*d*) of the Act of 1954. Paragraph 3 of the notice of opposition as originally delivered stated that Brook Green were "tenants under an agreement for a lease having less than 14 "months unexpired at the date of termination of the applicant's "current tenancy," and stated that their immediate landlords were the trustees, but by amendment dated March 11, 1958, they introduced between the words "under" and "an agreement," the further words "a lease continued by virtue of section 26 of "the Landlord and Tenant Act, 1954, or alternatively under."

Between the date of the commencement of the application and its hearing, there was some further correspondence between the solicitors to the parties. On January 23, 1958, Brook Green's solicitors wrote to Mrs. Cornish's solicitors, saying: "We think "it fair to add that, despite the letter of September 18, 1957, "counsel has advised that what was therein referred to as an "agreement for a lease dated January 18, 1957, was in fact only "an offer to grant a lease if certain conditions were fulfilled and "that the true position may be that the respondents are holding "over under the Act pending the execution of the new lease; it "should, however, be said that the respondents have for some "time paid the higher rent. The document of January 18, 1957, "and all relevant correspondence, etc., will of course be disclosed "on discovery."

After further correspondence between the various solicitors regarding Brook Green's status as "competent landlords" under the Act, and the question of the execution of the repairs, on

February 6, Mrs. Cornish's solicitors wrote to Brook Green's solicitors: "You will agree with us that, pending the confirmation "of the estate's surveyor that the work has been completed, the "question as to who is the competent landlord unfortunately still "remains open. It would, we feel sure you will agree, be a "waste of time and money to add the Grosvenor Estate trustees "as respondents to the proceedings if, as it appears likely to be "the case, the condition of the agreement for lease is likely to "be removed shortly. We, accordingly, suggest that the hearing "should be adjourned for a further month in order to allow time "for the grant of the lease to your clients whereby the position "will be beyond doubt." On February 17, 1958, the trustees' solicitors wrote to Brook Green's solicitors: "In view of the "desirability of the grant of the new lease to your clients, we "had hoped that the estate surveyor would by now have been "able to confirm to us that the works required under the offer "of terms had been carried out. He inspected the premises on "the 10th instant, however, and found that the broken over-"sailing course on the main parapet of the front elevation had not "yet been made good. Our clients are, however, in the circum-"stances prepared to agree that the grant of the new headlease "should be completed, provided that your clients will give an "undertaking in the terms of the enclosed document to the effect "that the works required under the offer of terms will be carried "out by June 24 next."

Finally, on February 26, 1958, Brook Green's solicitors wrote to the trustees' solicitors, saying: "As we have explained to you, "the issues in the proceedings between our clients and Mrs. "Cornish are such that we have advised them that it would be "inadvisable at this stage for them to take up and complete a "new lease from your clients and that they should, if possible, "delay doing so until after the proceedings have been disposed "of. There is no doubt, however, of their intention to complete "the lease in due course and to carry out the necessary work "referred to in the schedule to the agreement for lease. With "regard to the decision by Mrs. Cornish to add your clients as "parties to the proceedings, we are, as we have already informed "you, emphatically of the view (and we are so advised by "counsel) that our clients are the competent landlords for the "purpose of the Landlord and Tenant Act, 1954, and that con-"sequently the addition of your clients as parties is entirely "misconceived and should not, we suggest, be used in any "way to bring pressure upon our clients to complete the lease "immediately. In those circumstances we would be very grateful "if you would obtain your clients' instructions on the matter "and confirm to us that they are prepared to leave the completion of the lease in abeyance for the time being. With "regard to the execution of the necessary work, our clients would "for similar reasons prefer this to be delayed, but are, if your "clients should so insist, prepared to make arrangements for it "to be carried out without delay."

As appeared from the correspondence Brook Green had "for "some time" paid to the trustees the higher rent of £400 per annum which was mentioned in the offer of January 18, 1957, but it was not known when they started to pay this higher rent.

The county court judge directed that a new sublease of No. 23 should be granted; the landlords appealed and the tenant cross-appealed.

John Montgomerie for the landlords. The landlords' contention is that their tenure of No. 23 arose from a continuation, by virtue of the Act of 1954, of their lease of 1949; accordingly their interest arose more than five years previously, and they are entitled to rely on section 30 (1) (*g*).

The county court judge held that they held an equitable tenancy on the principle of *Walsh* v. *Lonsdale*,[2] which arose from the agreement of January, 1957, within the five-year period. Even assuming that to be so, the restriction in section 30 (2) ought to be so construed as to deal with the mischief aimed at, which was to disqualify a speculator from coming in and acquiring an interest which enabled him to evict a sitting tenant. It ought to be so construed as to confine it to a case where the landlord has first become such within the five years, and so as not to cover a case where, as here, the original interest arose long ago and has been recently enlarged: see *per* Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.*,[3] where it was held that the word "purchased" in section 30 (2) was to be construed as "bought for money" as in the Rent Acts. There are numerous decisions under the Rent Acts showing that the intention of Parliament must be taken into account where a literal interpretation would lead to injustice. [*Powell* v.

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[2] (1882) 21 Ch.D. 9.

[3] [1957] 1 Q.B. 159, 169; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

Cleland[4]; *Epps* v. *Rothnie*[5]; *Fowle* v. *Bell*[6]; *Baker* v. *Sims*,[7] and *Cunliffe* v. *Goodman*[8] were referred to.]

But in fact the doctrine of *Walsh* v. *Lonsdale* does not arise here; it cannot be applied in a court which has no equitable jurisdiction over premises of the value in question, nor in a case where it is relied on by a third party who has no equity to enforce: *Foster* v. *Reeves*.[9] Here the freeholders could have brought proceedings for specific performance, but the landlords could not, as the equity cannot arise where the agreement for the new lease is subject to the performance by them of a condition precedent which they have not performed: *Inland Revenue Commissioners* v. *Earl of Derby*.[10] So long as that condition is not performed the landlords have no equity; the true position is that they are holding under the lease of 1949 subject to the statutory extension and variations arising from the Act of 1954: see *Bolton's* case[11] and *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[12] It is true that the ground of opposition first put forward was an equitable tenancy, but no estoppel could arise as the tenant was not prejudiced in any way.

The last question is that which arises under the tenant's counter-notice, which alleges that the landlords are not a "competent landlord" to oppose her application. The landlords here satisfy the definition of "landlord" in section 44 (1); they had an interest in reversion on the termination of the subtenancy (see section 65 (1)) and they had that interest at the material time when the tenant made a request for a new tenancy: see *Diploma Laundry Ltd.* v. *Surrey Timber Co. Ltd.*[13]

Gabriel Cohen (*T. Michael Eastham* with him) for the tenant. The language of section 30 (2) regarding the five-year period is plain and clear, and the court should not construe it restrictively in order to give effect to some supposed purpose: see *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[14] A number of cases have been cited regarding the meaning of "purchase," but the issue here is when the landlords' interest was

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[4] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.

[5] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

[6] [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.

[7] [1958] 3 W.L.R. 546; [1958] 3 All E.R. 326.

[8] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[9] [1892] 2 Q.B. 255.

[10] [1914] 3 K.B. 1186.

[11] [1957] 1 Q.B. 159.

[12] [1958] Ch. 437; [1958] 2 W.L.R. 1.

[13] [1955] 2 Q.B. 604; [1955] 3 W.L.R. 404; [1955] 2 All E.R. 922.

[14] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

"created." After they had informed the tenant that they were holding under an agreement for a new lease they should not be allowed to resile from that assertion.

The county court judge was right in assuming jurisdiction, notwithstanding *Foster* v. *Reeves* [15]; that case debarred him from enforcing any equitable remedy in the case, but not from deciding whether an equitable right arose; if he could not decide such a question he would be debarred from fulfilling his functions under the Act.

The landlords' tenancy was not "created" under the Act, and if they held a continuing tenancy it was not such as to satisfy the definition of "tenancy" in section 69, so that they are not competent landlords within the meaning of section 44 (1) and Schedule VI (1). After they began to hold over they could not grant more than a six-month subtenancy, as their own rights could be terminated by notice by the trustees, and in such circumstances they could not be competent landlords. They have been working collusively with the trustees in order to suppress the fact that they have an equitable tenancy, and ought not to be allowed to plead their own wrong.

Cur. adv. vult.

January 23. Romer L.J., reading the judgment of the court, after stating the facts, continued: As a result of the evidence which was called at the hearing, the judge was satisfied, and so held, first, that the alternative accommodation which Brook Green offered to Mrs. Cornish was in no way suitable to her requirements and, secondly, that Brook Green had established a genuine intention to occupy No. 23 (if Mrs. Cornish's tenancy was terminated) for the purposes of their business. This second finding by the judge would accordingly entitle Brook Green to rely on section 30 (1) (*g*) of the Act of 1954 as a ground of opposition to Mrs. Cornish's application, provided that they were her "landlords" and not disqualified from relying on it by reason of section 30 (2). [His Lordship read that subsection and continued:] The judge held that this subsection operated as a bar to Brook Green's attempt to defeat Mrs. Cornish's application by relying upon section 30 (1) (*g*), and it would be convenient to consider this aspect of the case before dealing with any other issue. The matter arises in this way. If the interest which Brook Green had in No. 23, Lower Belgrave Street when, on

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[15] [1892] 2 Q.B. 255.

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September 12, 1957, they gave notice that they would oppose Mrs. Cornish's request for a new tenancy, was no more than their interest, continued by virtue of the Act of 1954 as head lessees from the trustees under the lease of 1949, it is clear that such interest was outside the disqualifying provisions of section 30 (2). It was suggested, however, and the suggestion was accepted by the judge, that by reason of the offer of a new lease by the trustees to Brook Green in January, 1957, and Brook Green's acceptance thereof, communicated to the trustees on April 9, 1957, a new interest in No. 23 was created in Brook Green which superseded their previous interest; and that such interest was accordingly within the mischief of section 30 (2). The applicant's contention on this point depends on the application to the relevant events of 1957 of the principle of equity exemplified by the case of *Walsh* v. *Lonsdale*.[1] That principle was enunciated by Cotton L.J. in *Lowther* v. *Heaver* in the following terms[2]: "A tenant "holding under an agreement for a lease of which specific per-"formance would be decreed stands now in the same position as "if the lease had been granted. He is entitled only in equity. "it is true, to a lease, but being entitled in equity to have a lease "granted his rights ought, in my opinion, to be dealt with in the "same way as if a lease had been granted to him, and do not "depend upon its actually having been granted."

Now it is quite true that in their letter of September 18, 1957, Brook Green's solicitors informed Mrs. Cornish's solicitors that "our clients hold the premises by virtue of an agreement for "lease dated January 18, 1957, for a term of 10½ years from "Michaelmas Day, 1956, to Lady Day, 1967," and a statement to the like effect appeared in Brook Green's formal opposition before the same was amended. It seems to us, however, that Brook Green and their solicitors were quite mistaken in supposing that at any relevant moment of time they were entitled as against the trustees to what we may for the sake of convenience refer to as the *Walsh* v. *Lonsdale* equity. The offer which accompanied Messrs. Boodle, Hatfield & Co.'s letter of January 18, 1957, to Brook Green was not, perhaps, a model of lucidity, but one thing about it which is quite clear is that the offer of a new lease of 23, Lower Belgrave Street was conditional upon Brook Green "first carrying out the works specified in the schedule" to the offer. There was no evidence before the judge as to the extent or cost of the works which Brook Green were to do before they could require the trustees to grant them the new lease, but it is conceded that they had not been done by September 12, 1957, when Brook Green notified Mrs. Cornish that they would oppose her application. Accordingly, by that date (which would appear to be the relevant date—see *Diploma Laundry Ltd.* v. *Surrey Timber Co. Ltd.*[3])—Brook Green were not in a position to sue the trustees for specific performance of an agreement to grant them a new lease, for the only agreement which then subsisted between them was subject to the fulfilment by Brook Green of a condition which they had not performed. From this it follows that one of the basic features of the *Walsh* v. *Lonsdale* equity was wanting and Brook Green could not have relied upon the equity in any proceedings against the trustees. It is true that Brook Green may have been by September, 1957, and probably were, paying to the trustees the higher rent which was envisaged in the conditional agreement, but that fact could not convert the agreement into an unconditional one. It is also true that some months later, in February, 1958, the trustees conditionally agreed to grant Brook Green the new lease even though the stipulated work had not been done; but this to our mind is nihil ad rem, for the trustees' solicitors were, on September 12, 1957, still regarding the carrying out of the scheduled work as a condition precedent to the granting of a new lease, as appears from their letter of that date to Messrs. Goodman, Derrick & Co. In our opinion the *Walsh* v. *Lonsdale* principle cannot be invoked in cases where an agreement for a lease is subject to a condition precedent which remains unperformed by the proposed tenant and has not been waived by the landlord, and this view is in accordance with the decision of Horridge J. in *Inland Revenue Commissioners* v. *Earl of Derby*,[4] which was, in our judgment, correct. Judge Blagden in the present case held that Brook Green were at all material times entitled to the benefit of the *Walsh* v. *Lonsdale* equity, and said, in dealing with the point, "Brook Green, "fearing, and with good reason, that if they went a step further "they might be caught by section 30 (2), have under advice "studiously abstained from fulfilling their obligation to repair, "pursuant to the agreement under which they hold and, of "course, from executing a lease. But, in my judgment, this "comes too late, and they have already and irretrievably crossed "the Rubicon. Supposing (contrary to the fact) that they had "failed to pay rent and were sued for it in the High Court by

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[1] (1882) 21 Ch.D. 9.

[2] (1889) 41 Ch.D. 248, 264.

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[3] [1955] 2 Q.B. 604; [1955] 3 W.L.R. 404; [1955] 2 All E.R. 922.

[4] [1914] 3 K.B. 1186.

"the Westminster trustees, Brook Green could not justify non-"payment of rent by pleading their own failure to repair. The "answer, if they tried to do so, would be: 'You can't take "'advantage of your own wrong and sit there on our land basking "'in Heaven's frown and seeking to excuse your breach of one "'of your obligations to us by pleading your breach of another "'of them. Two blacks do not make a white either in law or in "'equity, and in any case the latter deems that to be done which "'ought to have been done.' Clearly, their failure fully to per-"form their part of their agreement does not make them any the "less *Walsh* v. *Lonsdale* tenants."

Now it may well be (though it is unnecessary to decide the point) that if Brook Green had in September, 1957, refused to pay, or to continue to pay, the higher rent reserved by the conditional agreement, the trustees could have sued them for it. Their cause of action, however, if any, would, as it seems to us, have had to be founded on some implied agreement and not on the conditional agreement itself. However that may be, the judge's reasoning does not, and, as we respectfully suggest, could not, lead to the conclusion that in September, 1957, Brook Green could have sued the trustees for specific performance of the conditional agreement; and, therefore, they had no title at that time under the *Walsh* v. *Lonsdale* equity.

That being so, Brook Green are not, in our judgment, precluded by section 30 (2) of the Act in itself from relying on section 30 (1) (*g*), and the next question which arises is whether they are so precluded for any other reason. The applicant says by her cross-notice of appeal that they are, on the ground that only a "landlord" can oppose a tenant's application for a new tenancy under the Act, and that Brook Green are not a "land-"lord" within the definition of that term contained in section 44, or "the competent landlord" as defined in the Sixth Schedule to the Act.

By reason of section 24 (1) of the Act of 1954, both Brook Green's tenancy from the trustees and Mrs. Cornish's subtenancy from Brook Green continued in operation notwithstanding that, as a matter of contract, they both expired in September, 1956; and as neither tenancy was terminated subsequently in any manner authorised by the Act, the continuation of both tenancies was still effective when in September, 1957, Brook Green gave notice of their intention to oppose Mrs. Cornish's application for a new lease. In *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J.*

Graham & Sons Ltd.[5] Denning L.J. considered the position which arises from the continuation of a tenancy under the Act of 1954, and said that in his opinion the right view was that the common law tenancy subsisted with a statutory variation as to the mode of determination. In *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[6] Harman J. adopted the view of Denning L.J. and said that "having regard to the language used in the "Act of 1954 the term must be thought of as continuing by way "of a statutory extension." Accordingly, in the present case, the rights and obligations created by the lease of 1949 from the trustees to Brook Green were still in force (subject to the variations effected by the Act) when Mrs. Cornish's request to the trustees was rejected by them, as also were her own rights and obligations under her sublease of 1950. In these circumstances it would seem prima facie that Brook Green continued to be Mrs. Cornish's landlord and entitled as such to oppose her application for a new tenancy. Nor can we find anything in the Act to displace the prima facie view. [His Lordship read section 44 (1), and continued:]

There is nothing in that subsection which militates against the view that Brook Green continued to be Mrs. Cornish's landlord after September, 1956, for all purposes, including the purposes of Part II of the Act of 1954; and, if they were, then they were her "competent landlord" for the purposes of the Sixth Schedule to the Act if and so far as that Schedule has any relevance. It is, moreover, expressly provided by section 65 (1) of the Act that "where by virtue of any provision of this Act a "tenancy (in this subsection referred to as 'the inferior tenancy') "is continued for a period such as to extend to or beyond "the end of the term of a superior tenancy, the superior tenancy "shall, for the purposes of this Act and of any other enactment "and of any rule of law, be deemed so long as it subsists to be "an interest in reversion expectant upon the termination of the "inferior tenancy and, if there is no intermediate tenancy, to be "the interest in reversion immediately expectant upon the "termination thereof." The judge held that if (contrary to his view) Brook Green were not tenants of No. 23 under the *Walsh* v. *Lonsdale* equity, the interest to which they became entitled under the continuance provisions of the Act of 1954 constituted them Mrs. Cornish's landlords for the purposes of Part II of the

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[5] [1957] 1 Q.B. 159, 168; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[6] [1958] Ch. 437, 446; [1958] 2 W.L.R. 1.

Act, and we agree with him. The only argument, as we followed it, which was put forward before us on behalf of Mrs. Cornish in support of the contrary view was founded upon the definition of "tenancy" in section 69 of the Act. That definition, so far as relevant, is: "'tenancy' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease "or underlease, by an agreement for a lease or underlease or "by a tenancy agreement or in pursuance of any enactment "(including this Act) . . . and references to the granting of a "tenancy and to demised property shall be construed accordingly." The suggestion, as we understood it, was that in the light of this definition Brook Green's continued tenancy was not "created" by the Act of 1954, that, accordingly, they were not "tenants" of the trustees for the purposes of Part II of the Act and, therefore, were not Mrs. Cornish's "landlords" within the definition contained in section 44. Therefore, it was contended, they had no locus standi to oppose Mrs. Cornish's application under section 30. If we have followed the argument rightly, we are quite unable to accept it. If it were right, then in the innumerable cases (of which the present is an example) where subtenancies existed when the Act of 1954 came into force, Part II of the Act could have very little effective operation as between the head lessee and his under tenants. This would appear to be quite inconsistent with the general structure of the Act in this regard, and, in particular, with section 44 (1) (*b*), section 65 and the Sixth Schedule; and we are satisfied that the definition in section 69 was not intended to exclude tenancies which, if not strictly "created" by the Act, were given a statutory extension of life on the terms prescribed by the Act. In our judgment, therefore, Brook Green were by virtue of their extended tenancy from the trustees the "landlords" of Mrs. Cornish and entitled as such to oppose her application.

On the views above expressed, taken in conjunction with the judge's finding that Brook Green had established to his satisfaction the intention referred to in section 30 (1) (*g*), Mrs. Cornish's application for a new lease cannot succeed (see section 31 (1) of the Act), and the appeal must, in our judgment, be allowed. It, therefore, becomes unnecessary to consider certain other arguments which were addressed to us on the footing that the judge was right in holding that Brook Green became tenants of the trustees in 1957 by virtue of the *Walsh* v. *Lonsdale* equity. There are, however, two points which should, we think, be mentioned. The first is a suggestion which was made that Brook

Green are precluded from denying the statement in their solicitors' letter of September 18, 1957, that they then held the premises, No. 23, Lower Belgrave Street, by virtue of an agreement for lease. This would amount in effect to a plea of estoppel and does not seem to have been taken before the judge. Mr. Cohen, for Mrs. Cornish, did not press it before us, rightly as we think. It is difficult to see how the applicant changed her position on the faith of the statement or was, indeed, prejudiced by it in any way. There was, at all events, no evidence to this effect, and if Mrs. Cornish had desired to establish the point, it was for her to prove it. We think, therefore, that it is not open to her to rely upon it now.

The second point is with regard to the doubt which the judge felt as to his jurisdiction to decide the question whether Brook Green had a *Walsh* v. *Lonsdale* tenancy or not. A county court judge's jurisdiction to entertain actions to enforce specific performance of contracts for the lease of any property is limited to cases in which the value of the property does not exceed £500 (see County Courts Act, 1934, s. 52 (1) (*d*)). In *Foster* v. *Reeves*[7] this court had to consider the jurisdiction of a county court judge to entertain an action for rent against a person who was in possession of property, the value of which exceeded £500, under an executory agreement for a lease. By reason of the value of the property the county court judge had no jurisdiction to decree specific performance of the agreement, but he was of opinion that it was a case in which (under the *Walsh* v. *Lonsdale* principle) specific performance would be decreed by the High Court and that, therefore, he was bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff, the landlord, for the rent for which he was suing. This court, however, affirming the Divisional Court, held in effect that as the county court judge could not decree specific performance of the agreement, he had no jurisdiction to entertain the action for rent. In the course of his judgment Lord Esher M.R. said[8]: "If . . . we look to the common law alone this "claim cannot be supported. It is said, however, that equity "would decree specific performance, and that, if so, the case is "to be treated in every court as if specific performance had been "decreed and a lease granted. If that argument is sound, the "agreement is effective and the rent due. The answer given to "this contention is that a county court judge has no jurisdiction

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[7] [1892] 2 Q.B. 255.

[8] Ibid. 257.

"in such an equitable matter, and cannot take notice of this "equitable doctrine. The point is puzzling; but, on the whole, "I think the county court judge had no right in this case "to give judgment for the plaintiff. The matter could not be "brought within the equitable jurisdiction conferred on county "courts, and the judge had to deal with it at common law "only. If the debt is an equitable one, and cannot be treated "as a common law one, it could not be enforced in the county "court." The Master of the Rolls then went on to say that the judge of a county court was in the same position as a judge of a common law court before the passing of the Judicature Acts; and that if such an action as that under appeal had then been brought in a common law court, and the agreement had been put in, it could not have been enforced and the judge could have taken no notice of the equitable doctrine or entertained any inquiry as to its effect. Fry and Lopes L.JJ. delivered judgments to the same effect. We think that the note to section 52 (1) (*d*) of the Act of 1934 in the County Court Practice states sufficiently for present purposes the effect of *Foster* v. *Reeves*[9] as follows: "The effect of this decision is that where the value "of the premises exceeds £500 the only jurisdiction which the "judge can exercise is his common law jurisdiction. He is in "the same position as the judge of a common law court would "have been in before the Judicature Acts and consequently "cannot give effect to the equitable doctrine which was acted "on in *Walsh* v. *Lonsdale*."

In the present case the value of No. 23, Lower Belgrave Street is in excess of £500 and therefore a county court judge could not decree specific performance of an agreement to grant a lease of it. The difficulty which the judge felt in the present case was whether, having regard to the decision and judgments in *Foster* v. *Reeves*,[9] he had power to inquire whether, as the applicant alleged, a *Walsh* v. *Lonsdale* equity had been created between the trustees and Brook Green, even though he was not being asked to enforce it if he came to the conclusion that it had. In our judgment the judge was quite right in concluding that he had jurisdiction to entertain the question. By section 63 (2) of the Act of 1954 it is provided that "any jurisdiction "conferred on the court by any provision of Part II of this Act ". . . shall, subject to the provisions of this section, be exercised,— "(*a*) where the rateable value of the holding does not exceed "£500, by the county court; (*b*) where it exceeds £500, by the

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[9] [1892] 2 Q.B. 255, 257.

"High Court." One of the matters which necessarily arises in applications under Part II (as it arose, indeed, in the present case) is whether the relationship of landlord and tenant exists between the respective parties, and unless a county court judge has unfettered jurisdiction to determine that question, it is difficult to see how he can properly exercise the powers which are vested in him by the section. So long as the rateable value of the holding is not in excess of £500, he can, in our judgment, and must, inquire into the existence of a tenancy affecting that holding, whether such tenancy is said to have been created at law or in equity. In our opinion the judge expressed the position correctly in his judgment when he said: "I am not now asked, "as was the county court judge in *Foster* v. *Reeves*,[9] to enforce "any equitable right, whether to money, specific performance, "rectification or anything else. I am merely asked to determine "a question as to the nature of the right under which Brook "Green holds its premises, and answer that question I must if I "am to discharge my duty under section 63 (2) (*a*)." We agree with those observations of the judge.

It only remains to say in conclusion that for the reasons which we have earlier stated, this appeal should, in our judgment, be allowed.

Appeal allowed.

Solicitors: *Goodman, Derrick & Co.; Beddington, Hughes & Hobart.*

F. R. D.

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[9] [1892] 2 Q.B. 255, 257.

CADAM AND OTHERS *v.* BEAVERBROOK NEWSPAPERS LTD.

[1958 C. No. 1457.]

C. A.
1959
Jan. 28, 29.

Hodson and Morris L.JJ.

Libel and Slander—Libel—Pleadings—Amendment—Newspaper article stating that writ for conspiracy had been issued against named persons—Original defence that words not defamatory—Leave sought to amend defence by adding alternative plea of justification—Supporting particulars limited to repeating statement that writ for conspiracy had been issued—Whether defence as amended should stand—Principles applicable—R.S.C., Ord. 25, *r.* 4.

A newspaper, on March 22, 1957, published an article stating that a writ had been issued against four named persons for alleged conspiracy. The persons named issued a writ a year later claiming

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that they had been libelled by that article. By their original defence the defendant newspaper owners pleaded that the words did not and could not bear any meaning defamatory of the plaintiffs. Later, they sought leave to amend their defence by adding, by paragraph 5, an alternative plea of justification, supported by particulars which stated merely that " On or about March 20, 1957, " one [P. O.] . . . caused to be issued on his behalf and subsequently " served a writ claiming against the plaintiffs herein damages for " conspiracy to defraud and to deprive the said [P. O.] wrongfully " of his interests and rights in certain limited companies " :—

Held, that the amended plea of justification, supported by these particulars, should be allowed to stand; for the question whether a plea of justification supported by particulars which did no more than set out the contents of a writ could or did justify any possible defamatory meaning of the words was an arguable question and one for the judge and jury at the trial of the action.

The court should apply to a contested interlocutory application for leave to amend the same principles as those to be applied on an application to strike out pleadings under R.S.C., Ord. 25, r. 4[1]; and, accordingly, the power to refuse amendment should be exercised only in plain and obvious cases.

Per Morris L.J. An appropriate test on such an interlocutory application is to consider whether, if the original defence delivered had been in the amended form, the part added by amendment could have been struck out.

Kemsley v. *Foot* [1951] 2 K.B. 34, 38–39; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331 (C.A.) applied.

Hennessy v. *Wright* (1888) 57 L.J.Q.B. 594; 4 T.L.R. 651 considered.

Decision of Paull J. affirmed.

Appeal from Paull J.

The plaintiffs, John Eugene Cadam, David Daniels, Miss Zena Daniels, and Reginald Noakes issued a writ on April 30, 1958, against the defendants, Beaverbrook Newspapers Ltd., owners, printers and publishers of the Daily Express, a daily newspaper with a large circulation, claiming damages for libel alleged to be contained in an article headed " Zena Daniels Gets a Writ " and published in the issue of the newspaper for March 22, 1957.

The words complained of in the statement of claim were as follows:

" ZENA DANIELS GETS A WRIT. Mr. Percy Oakley, 67- " year-old former company director, of Sutton Coldfield, said last

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[1] R.S.C., Ord. 25, r. 4: " The " court or a judge may order any " pleading to be struck out, on the " ground that it discloses no reason- " able cause of action or answer, and " in any such case or in case of the " action or defence being shown by " the pleadings to be frivolous or " vexatious, the court or a judge may " order the action to be stayed or " dismissed, or judgment to be entered " accordingly, as may be just."

"night that his solicitor had issued a writ claiming £350,000 "damages for alleged conspiracy to deprive him of his interests "in certain limited companies. He named: Miss Zena Daniels, "the racehorse owner and company director; her father, Mr. "David Daniels; Mr. Reginald Noakes . . . Mr. Oakley's former "partner; and Mr. John E. Cadam . . . once Mr. Oakley's private "secretary. . . . Mr. Oakley said: 'A writ has been issued, and I "'have been told by my solicitor that it has been served. The "'companies were: [there followed a list of four companies with "'their addresses] I was originally managing director of those "'four companies. Mr. Daniels and Miss Daniels took over by "'arrangement.'"

The defendants by their original defence delivered on June 17, 1958, admitted publication of the words, but claimed that they did not bear and were incapable of bearing any meaning defamatory of the plaintiffs. A fortnight later the defendants delivered an amended defence, which by an additional paragraph, paragraph 5, pleaded: "Further or in the alternative the said words are "true in substance and in fact." Particulars of that justification were as follows: "On or about March 20, 1957, one Percy Oakley, "of Sutton Coldfield, a former company director, caused to be "issued on his behalf and subsequently served a writ of this "honourable court claiming against the plaintiffs herein damages "for conspiracy to defraud and to deprive the said Oakley wrong-"fully of his interests and rights in certain limited companies."

On receipt of that proposed amended defence, the plaintiffs' solicitors wrote to the defendants' solicitors on August 6, 1958, stating that they had been advised by counsel that as a condition precedent to the grant of leave to amend the plaintiffs were entitled to full particulars of the following matters: (*a*) of the facts and matters relied on in support of the allegation that the plaintiffs conspired to defraud the said Percy Oakley; (*b*) of the facts and matters relied on in support of the allegation that they conspired to deprive Oakley of his interests in certain limited companies and identifying such companies; (*c*) of the overt acts alleged to have been done by the plaintiffs in pursuance and/or execution of each of the said conspiracies; and (*d*) of the damage of £350,000 alleged to have been suffered by the said Oakley. The defendants refused to give any further particulars.

The matter came before Master Harwood on a restored hearing of the summons for directions on October 8, 1958, and the master refused leave to amend. The defendants appealed to Paull J. in chambers. The judge on November 6, 1958, gave the defendants leave to amend, and in so doing indicated that he approached the plaintiffs' opposition to the application to amend as the equivalent of an application by the plaintiffs to strike out the defence of justification, and that accordingly the same principles should apply as would apply on an application to strike out under the Rules of the Supreme Court. The judge also stated that the proper forum for the plaintiffs' objection to the plea of justification supported by the particulars in the new paragraph 5 was the judge at the trial of the action. Leave to appeal was granted, and the plaintiffs appealed.

Colin Duncan and *Paul Sieghart* for the plaintiffs. First, the proposed particulars to the plea of justification are in law incapable of supporting such a plea, for they do not go to the defamatory nature of the words in their natural and ordinary meaning. To justify a meaning which is not defamatory is not sufficient, for such a meaning is not in issue at all. The words "A writ has been issued" may be as defamatory as the words "X was arrested for theft." It is no justification to say that what was published was exactly what the defendants had been told; nor would the inclusion of the word "alleged"—often used by newspapers—make the words any less defamatory. X would have an unanswerable claim for damages for libel unless the newspaper could prove that the charge was true.

The words complained of here are in their natural and ordinary meaning capable of connoting dishonourable or discreditable conduct by the plaintiffs, and because of their implications they are defamatory. That submission is supported by the view of this court in *Morris* v. *Sanders Universal Products* [2] that the word "dismissed" was capable, without an innuendo, of a sinister and of an innocent meaning; and by the view of Ashworth J. in *Birne* v. *National Sporting League* [3] that to say of a person that he had been "expelled" from a body of which he had been a member was, in the natural and ordinary meaning of the word, defamatory, irrespective of any pleaded innuendo. [*Chapman* v. *Lord Ellesmere* [4] was also referred to.]

[MORRIS L.J. At the moment these defendants do not know what the plaintiffs say is the ordinary meaning of these words which is said to be defamatory. If at the trial the jury were told that there were two ordinary meanings, both defamatory, (*a*) that a case had been brought charging the plaintiffs with conspiracy to defraud, and (*b*) that the plaintiffs had been guilty of conspiracy to defraud, why could not the defendants reply that they meant (*a*) and that that is not defamatory because it is true?]

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[2] [1954] 1 W.L.R. 67; [1954] 1 All E.R. 47.

[3] The Times, April 12, 1957.

[4] [1932] 2 K.B. 431; 48 T.L.R. 309.

For the reason that these words do not mean merely that a writ has been served. There will be no dispute on that at the trial.

Secondly, the judge was wrong in treating the defendants' application to amend as if it were the same as a plaintiff's plea to strike out a pleading, for the two applications are different in kind and should not be approached on the same principles. To allow a defence to be put on the file with particulars which cannot justify it is not a proper exercise of the judicial discretion on an application to amend.

[HODSON L.J. That is a question of law, and not merely discretionary.]

Thirdly, the judge erred in deciding that the proper forum for the plaintiffs' objection to the amendment was the judge at the trial of the action. These particulars which do not justify a defamatory content are embarrassing to the plaintiffs. Though normally a defendant is bound by his particulars of justification, the jury at the trial may say " There is no smoke without a fire " and may find for the defendants.

[MORRIS L.J. To succeed on this interlocutory application it would be necessary to convince this court that these particulars could not justify *any* conceivable defamatory meaning of these words in their ordinary sense.]

These defendants have done no more in their particulars than repeat the words complained of; and if this court holds them to be defamatory, the defendants must accept responsibility for repeating the libel.

The public nature of a writ makes no difference, for it is no answer to a claim for libel for the publisher to say that he paid 2s. 6d. to obtain a copy of the writ and was thereafter entitled to publish it. It is or may still be defamatory: see *per* Campbell J. in *Park* v. *Detroit Free Press Co.*[5] that pleadings are addressed to the court and to no other person. [*MacLeod* v. *Ross* (*Justices of the Peace for Lewis*)[6] was also referred to.]

Gerald Gardiner Q.C. and *Helenus Milmo* for the defendants. By way of preliminary observations, these interlocutory proceedings are a waste of time and money for everyone, for since the

[5] (1888) 16 Am.St.R. 544, 550.

[6] (1892) 20 Rettie 218.

abolition of demurrer disputes of fact and law ought to be decided in the proper constitutional forum, which is the court trying the action, save in the rare cases where a preliminary point of law is set down under R.S.C., Ord. 25, r. 2. Further, the defence of justification would have been put into the defence originally delivered if the plaintiffs had not waited a year after publication before issuing their writ, making it necessary for the defendants to have time to make researches as to the source of the information on which the article was based. Finally, the decision whether or not to allow an amendment is entirely discretionary and the judge's exercise of his discretion in favour of the defendants should not be disturbed.

If, however, the decision is not purely discretionary but is a question of law—as Paull J. ultimately decided it was—then it is submitted, first, that the same principles must be applied to this application to amend as are applied to an application to strike out under R.S.C., Ord. 25, r. 4, and Ord. 19, r. 27, and therefore the power should be exercised only in plain and obvious cases: see *per* Somervell L.J. in *Kemsley* v. *Foot*,[7] and the leading case of *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark Ltd.*[8] In *Dyson* v. *Attorney-General*[9] it was held that on an application under R.S.C., Ord. 25, r. 4, a court should not decide whether a plea was good or bad but only whether it was arguable. [*London Corporation* v. *Horner*[10] was also referred to.] The question here is whether this defence could be struck out, or could have been struck out if it had appeared in the original defence delivered, as unarguable; it is submitted that, so far from being unarguable, this is the best known outstanding point in the law of defamation which has been constantly discussed for over 30 years and has never been decided. It is the last question in the world which this court ought to say the defendants should not be allowed to argue. The question as to what a newspaper has to prove when it has reported that a charge has been made or an action started probably does not admit of any general answer, for it depends on the particular words in the particular publication. Everything may turn on what the words mean.

[HODSON L.J. Do you agree that the word "alleged" carries no weight?]

It would depend on the view which the jury take of it and whether they consider that it makes any difference to the meaning of the words. Newspapers put it in to safeguard themselves against a possible accusation that they associate themselves with the charge.

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[7] [1951] 2 K.B. 34, 38; [1951] 1 T.L.R. 97; [1951] 1 All E.R. 331 (C.A.).

[8] [1899] 1 Q.B. 86; 15 T.L.R. 29.

[9] [1911] 1 K.B. 410, 420; 27 T.L.R. 143.

[10] (1914) 111 L.T. 512, 513, 514.

The only authority of any relevance on this interesting point is *Hennessy* v. *Wright*,[11] an interlocutory appeal where an innuendo had been pleaded, and Cotton L.J.[12] said that the defendant who had pleaded justification must tell the plaintiff whether the justification meant merely that the report had been published or went further and meant that the report was justified. In the present case the defendants have made it clear that it is no part of their case that the plaintiffs have been guilty of a conspiracy to defraud, and they will be tied to these particulars at the trial. Their defence, so limited, may succeed or fail; but this being peculiarly a field where the constitutional tribunal is the judge and jury, it is particularly unsuitable for determination on an interlocutory application. Not only the plaintiff but also the defendant has a right to trial of an action for libel by jury and not to have a case decided against him until a jury, and none but a jury, decide what defamatory meaning the words have: see *per* Scrutton L.J. in *Broome* v. *Agar*.[13]

[MORRIS L.J. But at the trial no one will know what the jury have found. They will be asked to say whether the words in their ordinary meaning are defamatory.]

The judge could ask them whether the words mean (*a*) or (*b*), though the jury have a statutory right to say merely "verdict "for the plaintiff" or "for the defendant" and no more. The defendants' difficulty is that they do not know what the plaintiffs say is the ordinary meaning of these words, and the plaintiffs maintain that they have the right to keep their view of the meaning locked in their breasts until the trial. It may be that at the trial the defendants will say that, in the absence of an innuendo pleaded in accordance with R.S.C., Ord. 19, r. 6 (2), it is not open to the plaintiffs to suggest that the words are capable of meaning anything other than what they say, namely, that "A "writ has been issued."

[HODSON L.J. It is said against you that if that is all that is meant, no purpose is served by this alternative plea of justification.]

But a defendant is entitled to plead cumulative or alternative defences to an action for libel. Each separate plea may be a complete defence, and a plaintiff ought not to be put into the position of being able to dictate to a defendant which plea he will put first.

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[11] (1888) 57 L.J.Q.B. 594; 4 T.L.R. 651.

[12] 57 L.J.Q.B. 594, 596.

[13] (1928) 44 T.L.R. 339.

Though this court has very extensive powers under R.S.C., Ord. 58, r. 9 (3), there is an exception to the exercise of those powers in that in the law of defamation, where words are obviously defamatory, and the jury find that they are not, this court cannot give judgment for the plaintiff. It can only set aside the verdict as unreasonable and order a new trial. That is an additional reason for saying that the proper forum for this decision is the trial.

As to the public nature of a writ, there is a distinction between passing on information obtained from an individual and passing on information obtained from a writ. In *De Crespigny* v. *Wellesley*[14] the defamatory report was purely private and Best C.J.[15] specifically excepted a case concerning the administration of justice. The Detroit rule as to pleadings being private documents is different from the English rule, for under R.S.C., Ord. 61, r. 17, it is open to members of the public on payment of the appropriate fee to read all the documents in a case: see also Ord. 61, r. 24, which is in mandatory form. Many people do not know of those rules, for they do not read so far in the Annual Practice, and therefore they are seldom used; but they are there and show by their terms that in relation to civil suits it is considered to be in the public interest that these matters in pending proceedings should be available to the public.

[Hodson L.J. I expect the newspapers know all about them.]

They may not, for the rules are not extensively used.

Duncan in reply. From time immemorial counsel has been entitled to invite the jury to say that the natural and ordinary meaning of particular words is X or Y. Unless these plaintiffs thought that that meaning of these words was more than the delivery of a writ, these proceedings based on defamation would not have been begun. But the jury are not obliged to say what they think these words mean. It is very rare for judges to suggest possible meanings to a jury, and I have never known it to be done.

[Morris L.J. Counsel on both sides might agree that there were only two possible meanings.]

Then those two meanings might be put to a jury, but the jury could still decline to do more than say " Verdict for the plaintiff

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[14] (1829) 5 Bing. 392.

[15] Ibid. 403.

"or defendant," except that juries do not usually know of their statutory right to do no more than that.

Hennessy v. *Wright*[16] was decided a long time ago, but the general expression of opinion of the court in that case supports the present contentions.

[HODSON L.J. If your view is right, the order made in that case would not have been made.]

The submissions made here were not made in that case. To leave this proposed defence in its present form must cause injustice to the plaintiffs, and to refuse leave would do no harm to the defendants.

HODSON L.J. The appeal is in a pending libel action, and on the assumption that the action has to be tried it is obviously undesirable—and indeed it would be wrong—for this court to express any opinion on any matters which are not strictly necessary for the determination of the appeal.

The order appealed from is an order giving the defendants to the action, Beaverbrook Newspapers Ltd., leave to amend their defence by adding a plea of justification supported by a paragraph containing the particulars of justification. The position is that the four plaintiffs by their writ are claiming damages for libel in an article which appeared on page 7 of the Daily Express of March 22, 1957. The gist of that article was that the four plaintiffs were defendants in an action on a writ claiming damages against them for alleged conspiracy. The article is merely a repetition of the writ. By their defence, the defendants, first of all, said that the words did not bear and were incapable of bearing any meaning defamatory of the plaintiffs, or any of them. The defendants had second thoughts, and do not now seek only to rely on the defence that the words to which I have referred are incapable of bearing any meaning defamatory of the plaintiffs, but seek to say in addition that the words are true. It is in this connection that the controversy has arisen.

It is said that leave to amend was rightly refused by the master before whom the matter first came, because the particulars of justification do not justify any defamatory contents of the libel. To put the matter plainly, the particulars of justification merely say: "On or about March 20, 1957, one Percy Oakley of Sutton "Coldfield, a former company director, caused to be issued on "his behalf and subsequently served a writ claiming against the

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[16] 57 L.J.Q.B. 594.

"plaintiffs herein damages for conspiracy to defraud"—the words "to defraud" were not in the original article but appear on the face of the writ—"and to deprive the said Oakley wrongfully of "his interests and rights in certain limited companies." The plaintiffs say that those particulars cannot justify a libel on the footing that the words have a defamatory meaning since the defendants are only saying that they had published defamatory matter which has come from another source.

The principle is: "'Every republication of a libel is a new "'libel and each publisher is answerable for his act to the same "'extent as if the calumny had originated with him.' It is no "defence to an action for such republication that the defendant "received the libellous statement from another whose name he disclosed at the time of publication." I am reading Gatley on Libel (4th ed., p. 106). The first sentence is an extract from the judgment of the court in *Morse* v. *Times-Republican Co.*[1] The justification for the second sentence is given as *De Crespigny* v. *Wellesley*,[2] to which we were referred. But, for the reasons indicated at the beginning of my judgment, I do not propose to refer in detail to that case where no question of the administration of justice was concerned, as indeed Best C.J. pointed out.[3] The position, therefore, is that if you choose to repeat a calumny you must take the responsibility for so doing, and if the words are not in themselves defamatory the question of justification does not arise. It is only if the words are defamatory of the plaintiffs that the plea of justification arises, and it is said that the defendants have given no support for that by merely stating that what they have said is derived from a writ.

It is sufficient to say that, although experienced counsel have been engaged on both sides in this case, so far as the court knows there is no authority directly in point. The question seems to me to be open to argument whether, on the footing that the words are capable of being defamatory and are found to be defamatory of the plaintiffs, the defence which is put forward of justification can be supported by a reference to the issue of a writ. The plea is an alternative plea. There is no embarrassment to the plaintiffs in the alternative plea standing as it is, although, as Mr. Duncan rightly says, in the forefront of this case there will be, as necessarily must be the case in every libel action, the question whether the words bear or are reasonably capable of bearing a defamatory meaning, which is primarily for the judge, though ultimately it may become a question for the jury whether the words in fact are defamatory.

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[1] (1904) 124 Iowa 717.
[2] (1829) 5 Bing. 392, 401–402.
[3] Ibid. 405.

I have endeavoured to avoid expressing any view as to what perhaps, on the face of it, may be a somewhat surprising contention on the part of the plaintiffs, that merely setting out the contents of the writ and publishing it in the newspaper in circumstances such as these is defamatory. Of course, there may not be any general answer to that question. It may, as Mr. Gardiner submitted, depend on the circumstances of each particular case. It may perhaps depend on the nature of the proceedings.

But these two pleas, the plea of justification and the plea that the words are incapable of bearing a defamatory meaning, are interlocked to some extent, although they will have to be dealt with separately by the judge who directs the jury on this matter.

It is clear to my mind that, on this appeal, the question is not one of merely considering whether the judge has exercised his discretion in the sense that he has, rightly or wrongly, given leave to amend too late, in time, or without imposing any adequate safeguards: the question is whether, as a matter of law, this amended plea, supported by these particulars, ought to be allowed to stand.

The plaintiffs made their position quite clear, because, as soon as the amended plea was submitted to them, they considered it, and asked for particulars of the facts and matters relied on in support of the allegation that the plaintiffs conspired to defraud Percy Oakley; other similar questions were contained in the letter asking for particulars, but those particulars were refused. The defendants, so far as it was possible for them to do so, confined themselves to stating that they were merely relying on the fact that charges had been made and were not purporting to say that there was any substance in those charges. As I see it, the position being that the judge had to decide, as a matter of law, whether this defence ought to be allowed to stand or not, it is the same as if the application before him had been an application to strike out the amended plea. The problem is the same and has to be looked at in the same way.

The relevant rule in considering the matter is R.S.C., Ord. 25, r. 4: "The court or a judge may order any pleading to be struck "out, on the ground that it discloses no reasonable cause of "action or answer, and in any such case or in case of the action "or defence being shown by the pleadings to be frivolous or "vexatious, the court or a judge may order the action to be "stayed or dismissed, or judgment to be entered accordingly, as "may be just." It is agreed on all sides that it is only in plain cases that the court will act under that rule. Various authorities were referred to, and I will refer to some of the observations made by Somervell L.J. in *Kemsley* v. *Foot*,[4] in which he considered not only R.S.C., Ord. 25, r. 4, but also Ord. 19, r. 27, which is also concerned with striking out. "The type of case "appropriate for an application under these rules was considered "in, among other cases, *London Corporation* v. *Horner*[5] and "*Hubbuck & Sons* v. *Wilkinson, Heywood & Clark Ltd.*,[6] a "decision of this court. These cases are referred to in the Annual "Practice under R.S.C., Ord. 25, r. 4, and Sir Walter Monckton "at one time submitted that so strict a principle did not apply to "Ord. 19, r. 27. An examination of the latter case makes it, "I think, clear that, although the application, as here, was under "both rules, it was Ord. 19, r. 27, which was substantially in "question. The effect of the cases is accurately summarised in "the Annual Practice, and I think applies to both rules. They "should be applied only in plain and obvious cases, and if there "is a point of law which requires serious discussion, an objection "should be taken on the pleadings and the point set down for "argument under Ord. 25, r. 2."

As counsel pointed out to us in the course of the argument, the difference between the two Orders is that under Ord. 25, r. 2, a point of law can be ordered and dealt with by the judge, whose decision is subject to appeal, whereas under the provisions of Ord. 19, r. 27, and Ord. 25, r. 4, there is no appeal without leave. That is an indication of the view taken by the courts that it is only in the most obvious cases that this drastic step of striking out can be taken.

We were referred to *Hennessy* v. *Wright*[7]—which I merely refer to in passing to show that I had it in mind—a decision of the Court of Appeal, where a kindred question arose. In that case the question was whether the plaintiff was entitled to the information whether the defendant intended to justify more than one meaning of the words, that is to say, whether the libel was capable of meaning either that a charge had been made against the plaintiff or that a charge had been made and was true. The Court of Appeal confirmed the order which had been made by the Divisional Court that the plaintiff should be given that information. However, as Mr. Duncan rightly says, the only thing that can fairly be said about that case is that no one took the point that there could not be any justification in merely stating that a charge had been made. The matter was not considered by the court. The members of the court were Cotton, Bowen and Fry L.JJ. Cotton L.J. at the end of his judgment said: "I think it will be a sufficient compliance with the order of "the court if the defendant informs the plaintiff whether he "intends to say the report is a true one, or whether he intends "to say that the facts charged against the plaintiff are true."[8]

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[4] [1951] 2 K.B. 34, 38–39; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331 (C.A.).

[5] (1914) 111 L.T. 512.

[6] [1899] 1 Q.B. 86; 15 T.L.R. 29.

[7] (1888) 57 L.J.Q.B. 594; 4 T.L.R. 548, 651.

In my view, the course which this court ought to take on such an interlocutory application as this is quite plain, and that is, that the appeal should be dismissed.

MORRIS L.J. I entirely agree. The plaintiffs in this case do not allege that the words " were used in a defamatory sense other " than their ordinary meaning "—I quote the language of R.S.C., Ord. 19, r. 6 (2). It will be for the judge at the hearing to decide whether the words are capable of a defamatory meaning. It will be for the jury to say whether the words in fact do bear a defamatory meaning. The plaintiffs do not specify, and are not obliged to specify, what is the ordinary meaning, or what are the ordinary meanings of the words that they allege. But they say that the words complained of are in their ordinary meaning defamatory.

In a case of this kind it seems to me that leave to amend would normally be given without any difficulty. An appropriate test, in the problem now before us, is to consider whether, if the defence as originally delivered had been in the form for which leave has now been given, the part added by amendment and contained in paragraph 5 could have been struck out. That involves the question whether that paragraph discloses a reasonable answer, or whether it discloses no reasonable answer to the claim. That must involve a submission on the part of the plaintiffs that paragraph 5 could be no answer to any conceivable defamatory meaning which a jury might find. The defendants at this stage do not know what is the ordinary meaning which the plaintiffs ascribe to those words, and they certainly do not know what is the ordinary meaning which a jury might ascribe to those words. It is quite clear that in giving particulars of justification the defendants are bound by the particulars that they have given: they cannot go beyond those particulars.

[8] 57 L.J.Q.B. 594, 596.

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As I followed the submissions made before us, if it were thought that the words complained of meant that the defendants were saying that the plaintiffs had in fact been guilty of a conspiracy to defraud or deprive Oakley of his interests, the defendants are not by their particulars as delivered saying that they justify that meaning. If the words have some other meaning, could those particulars as delivered possibly justify some other meaning? It is sufficient at this stage to say that at the trial the issues which have been referred to in the very interesting arguments on both sides will have to be debated, and the judge who tries this case will have to give a careful direction to the jury. But this is certainly not the time to express any opinion upon those matters that have been debated. It is certainly not a plain and obvious case. In my judgment, it could not be said that these particulars could not justify some conceivable defamatory meaning that somebody might say was the ordinary meaning of those words. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Basil Greenby & Co.; Oswald, Hickson, Collier & Co.*

M. M. H.

1958
Dec. 18, 19.
1959
Jan. 19.
Diplock J.

FOWLER *v.* LANNING.

Practice—Pleading—Trespass—Whether plaintiff must plead negligence.
Burden of Proof—Trespass to the person—Negligence—Proof of.
Trespass—Trespass to the person—Unintentional act—Shooting accident —Whether action will lie without proof of negligence—Whether distinction between injury on highway and elsewhere.

In an action based on trespass to the person the plaintiff's statement of claim alleged simply that on a certain date and at a certain place "the defendant shot the plaintiff," and that by reason thereof the plaintiff sustained personal injuries, particulars of which were given. The defendant by his defence traversed the allegations of fact and objected that the statement of claim disclosed no cause of action on the ground that the plaintiff did not allege that the shooting was intentional or negligent:—

Held, (1) that trespass to the person did not lie if the injury to the plaintiff was caused unintentionally and without negligence on the defendant's part, and this applied whether the injury was caused on the highway or in any other place.

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(2) That, if negligence was a necessary ingredient of unintentional trespass only where the circumstances showed that the plaintiff had taken upon himself the risk of inevitable injury, the plaintiff today must be considered as taking upon himself such a risk arising from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful.

(3) That the onus of proving negligence, where the trespass was not intentional, lay upon the plaintiff, who should plead and give particulars of negligence; accordingly, having failed to do so, the plaintiff's statement of claim disclosed no cause of action.

Dictum of Blackburn J. in *Fletcher* v. *Rylands* (1866) L.R. 1 Ex. 265, 286; *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261 and *Stanley* v. *Powell* [1891] 1 Q.B. 86 applied.

Weaver v. *Ward* (1617) Hob. 134; *Hall* v. *Fearnley* (1842) 3 Q.B. 919; 12 L.J.Q.B. 22; *Wakeman* v. *Robinson* (1823) 1 Bing. 213; *River Wear Commissioners* v. *Adamson* (1876) 2 App.Cas. 743 considered.

Quaere, whether, if a statement of claim discloses facts which invoke the doctrine res ipsa loquitur, it is necessary for negligence to be pleaded in terms.

PRELIMINARY POINT OF LAW under R.S.C., Ord. 25, r. 2.

On March 26, 1958, the plaintiff, Thomas Winston Fowler, issued a writ claiming damages from the defendant, William George Lanning, for trespass to the person. By his statement of claim, delivered on March 29, 1958, the plaintiff alleged that "on November 19, 1957 at Vinyard Farm, Corfe Castle, in the "county of Dorset the defendant shot the plaintiff. By reason "of the premises the plaintiff sustained personal injuries," particulars of which were given. On May 9, 1958, the defendant delivered a defence traversing the plaintiff's allegations of fact and objecting "that the statement of claim is bad in law and "discloses no cause of action against him on the ground that "the plaintiff does not allege that the said shooting was either "intentional or negligent." On July 31, 1958, the Bournemouth District Registrar ordered that the point of law raised by the defendant's objection be tried as a preliminary point of law under the provisions of R.S.C., Ord. 25, r. 2, and the plaintiff's appeal against this order was dismissed by Pearson J. in chambers on October 2, 1958.

Ingram Poole for the applicant (defendant). At one time it was thought that in trespass it was only necessary to prove injury and it then fell to the defendant to justify or excuse his act: see the article by Professors Winfield and Goodhart on Trespass and Negligence, 1933 Law Quarterly Review, vol. 49, p. 359.

In the latter half of the nineteenth century a change occurred, and in *Fletcher* v. *Rylands* [1] Blackburn J. first expressed the view that persons who were injured on a highway must prove intention or negligence in order to succeed in an action for trespass. See also Lord Blackburn in *River Wear Commissioners* v. *Adamson*.[2] In *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.*[3] McCardie J. held that negligence or wilful intention was an essential ingredient of liability in trespass in highway cases. This principle is now well established: see *per* Devlin J. in *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [4] and *per* Lord Tucker on appeal in that case to the House of Lords.[5] *Weaver* v. *Ward*,[6] *Underwood* v. *Hewson* [7] and *Leame* v. *Bray* [8] were all decided on pleading points and do not determine the law in any general sense. In so far as *Leame* v. *Bray* [8] purported to decide that it was only necessary to prove the act of trespass, it is inconsistent with modern authorities, as it was a highway case: see *per* Lord Wright in *Winnipeg Electric Co.* v. *Geel*.[9]

Even outside the highway, intention or negligence are essential ingredients of trespass to the person: *Stanley* v. *Powell*,[10] which was approved by the Court of Appeal in *National Coal Board* v. *J. E. Evans & Co. (Cardiff) Ltd.*[11]; see also *per* Bramwell B. in *Holmes* v. *Mather*.[12] There is a distinction between cases involving inevitable accident, where the defendant has to show that something happened over which he had no control, and cases where a mere want of care and skill must be established: *The Albano* [13]; *Manton* v. *Brocklebank*.[14] In trespass to the person, negligence or intention must be pleaded and proved by the plaintiff: see *per* Lord Macmillan and Lord Simonds in *Read* v. *J. Lyons & Co. Ltd.*[15]; *per* Stable J. in *Morriss* v. *Marsden* [16]; and the decision of the Supreme Court of British Columbia in *Walmsley* v. *Humenick*.[17]

H. E. Lewis McCreery for the respondent (plaintiff). It is difficult to envisage circumstances in which the defendant here could have shot the plaintiff rightfully. This is a classic example of battery vi et armis. While there might be an alternative cause of action in negligence, the proper cause of action here is trespass: see *Holmes* v. *Mather.*[18] Once the plaintiff proves an actual trespass, his cause of action is complete: *per* Devlin J. in *Esso Petroleum Co. Ltd.* v. *Southport Corporation.*[19] The shooting in the present case was not on or near a highway. It is conceded that the plaintiff will fail unless the act of trespass was intentional or negligent, but if the defendant fails to prove the lack of such intention or negligence, the plaintiff must succeed. Once the plaintiff has proved the act of trespass, the onus of proof shifts to the defendant: see precedents of statements of claim for trespass to the person in Bullen & Leake's Precedents of Pleadings, 3rd ed., p. 411; 11th ed., p. 643. No allegation of intention or negligence appears therein: see *Wakeman* v. *Robinson.*[20]

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[1] (1866) L.R. 1 Ex. 265, 286.

[2] (1876) 2 App.Cas. 743, 767.

[3] [1924] 2 K.B. 75, 82; 40 T.L.R. 591.

[4] [1953] 3 W.L.R. 773, 777; [1953] 2 All E.R. 1204.

[5] [1956] A.C. 218, 244; [1956] 2 W.L.R. 81, 93; [1955] 3 All E.R. 864.

[6] (1617) Hob. 134.

[7] (1724) 1 Strange 596.

[8] (1803) 3 East 593.

[9] [1932] A.C. 690, 695; 48 T.L.R. 657.

[10] [1891] 1 Q.B. 86.

[11] [1951] 2 K.B. 861; [1951] 2 T.L.R. 415.

[12] (1875) L.R. 10 Ex. 261, 268.

[13] [1892] P. 419; 8 T.L.R. 425.

[14] [1923] 2 K.B. 212; 39 T.L.R. 344.

[15] [1947] A.C. 156, 170; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[16] [1952] 1 T.L.R. 947; [1952] 1 All E.R. 925, 927.

[17] [1954] 2 D.L.R. 232.

It is not suggested that this is a case of absolute liability, but it is the duty of the defendant, once the trespass is admitted or proved, to justify it if he can: *Weaver* v. *Ward* [21]; *Knapp* v. *Salsbury* [22]; *Milman* v. *Dolwell* [23]; *Hall* v. *Fearnley* [24]; *Holmes* v. *Mather.*[25] (*Knapp* v. *Salsbury* [26] and *Gibbons* v. *Pepper* [27] appear to be directly opposed.) See also *per* Denman J. in *Stanley* v. *Powell* [28]; *per* Goddard L.J. in *Dumbell* v. *Roberts* [29]; *per* Denning L.J. in *Esso Petroleum Co. Ltd.* v. *Southport Corporation.*[30]

There is no binding authority for the proposition that in an action for trespass off the highway the plaintiff must prove negligence or intention. In *Stanley* v. *Powell* [31] the plaintiff put his case in negligence and thus took upon himself the burden of proving it. *Stanley* v. *Powell* [31] is authority for the proposition that if there is no negligence or intention, the plaintiff's claim fails, but it is not an authority on the pleading aspect or on the burden of proof: see *per* Cohen L.J. in *National Coal Board* v. *J. E. Evans & Co. (Cardiff) Ltd.*[32] In *Morriss* v. *Marsden,*[33]

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[18] L.R. 10 Ex. 261, 268.
[19] [1953] 3 W.L.R. 773, 781.
[20] (1823) 1 Bing. 213.
[21] Hob. 134.
[22] (1810) 2 Camp. 500.
[23] (1810) 2 Camp. 378.
[24] (1842) 3 Q.B. 919.
[25] L.R. 10 Ex. 261.
[26] 2 Camp. 500.
[27] (1695) 1 Ld.Raym. 38.
[28] [1891] 1 Q.B. 86, 90.
[29] (1944) 60 T.L.R. 231; [1944] 1 All E.R. 326, 331.
[30] [1954] 2 Q.B. 182, 197, 198; [1954] 3 W.L.R. 200, 211, 212.
[31] [1891] 1 Q.B. 86.
[32] [1951] 2 K.B. 861, 874.
[33] [1952] 1 T.L.R. 947.

Weaver v. *Ward*[34] and *Dumbell* v. *Roberts*[35] were not cited. In *Walmsley* v. *Humenick*[36] Clynes J. misunderstood the effect of *Stanley* v. *Powell*[37] and assumed that because the plaintiff fails if the defendant proves want of intention or negligence the plaintiff must plead intention or negligence.

In the present case the allegation of shooting in itself imports negligence because normally one does not shoot another unintentionally without negligence. The doctrine res ipsa loquitur applies. Even if negligence or intention has to be averred, it is not necessary to specify one or the other. Where the facts permit, they can be pointed to with the comment "res ipsa loquitur," but those words do not have to appear in the pleading.

The basis of the rule in highway cases is the principle volenti non fit injuria, and the reason for the rule is the general convenience of mankind. When one goes on the highway, one is exposed to all kinds of hazard and must be taken to have accepted the risks involved. *Bolton* v. *Stone*[38] was pleaded in negligence or nuisance. *Read* v. *J. Lyons & Co. Ltd.*[39] does not support the plaintiff here.

Poole in reply. The plaintiff must plead the matters on which he relies, in the absence of which he must fail: R.S.C., Ord. 19, r. 4. He must say whether intention or negligence is alleged, as otherwise the defendant does not know what case he has to meet. A plaintiff cannot today—83 years after the Judicature Act, 1875—alter his position according to whether he alleges trespass or negligence in respect of the same facts. The statement of Devlin J. in *Esso Petroleum Co. Ltd.* v. *Southport Corporation*,[40] relied on by the plaintiff, is not binding, while the observations of Denning L.J. in that case[41] are obiter and depend upon *Weaver* v. *Ward*,[42] which has never been specifically approved by the Court of Appeal. In the United States of America it has also been held that in trespass to the person the burden of proving intention or negligence lies on the plaintiff: *Brown* v. *Kendall*.[43]

Cur. adv. vult.

January 19. Diplock J. read the following judgment.

"The distinction between actions of trespass on the case

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[34] Hob. 134.

[35] 60 T.L.R. 231.

[36] [1954] 2 D.L.R. 232.

[37] [1891] 1 Q.B. 86.

[38] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[39] [1947] A.C. 156.

[40] [1953] 3 W.L.R. 773, 781.

[41] [1954] 2 Q.B. 182, 197, 198.

[42] Hob. 134.

[43] (1850) 6 Cush. 292 (U.S.A.).

"and trespass vi et armis should be most carefully and precisely "observed. Otherwise we shall introduce much confusion "and uncertainty." So said de Grey C.J. in 1773 in *Scott* v. *Shepherd.*[1] It must gratify the ghosts of generations of special pleaders that today, nearly a century after the passing of the Judicature Act, 1875, I should be invited to decide whether such a distinction still exists where an unintentional injury to the person of the plaintiff arises directly from an act of the defendant, and should be invited to decide this point upon what is the modern equivalent of demurrer.

The writ in this case claims damages for trespass to the person committed by the defendant at Corfe Castle, in the county of Dorset, on November 19, 1957. The statement of claim alleges laconically that at that place and on that date "the defendant "shot the plaintiff," and that by reason thereof the plaintiff sustained personal injuries and has suffered loss and damage. By his defence the defendant, in addition to traversing the allegations of fact, raises the objection "that the statement of claim is bad "in law and discloses no cause of action against him on the ground "that the plaintiff does not allege that the said shooting was "either intentional or negligent."

An order has been made that this point of law be disposed of before the trial of the issues of fact in the action. That order is binding upon me, and, in disposing of it, I can look no further than the pleadings. I must confess that at first glance at the pleadings I felt some anxiety lest I was being invited to decide a point which has long puzzled the professors (see the article by Professors Goodhart and Winfield, 1933 Law Quarterly Review, vol. 49, p. 359; Pollock on Torts, 15th ed., p. 128; Salmond on Torts, 12th ed., p. 311; Winfield on Torts, 5th ed., p. 213), only to learn ultimately that, just as in *Donoghue* v. *Stevenson*,[2] there was in fact no snail in the ginger-beer bottle,* so in this case there was in fact no pellet in the defendant's gun.

The point of law is not, however, a mere academic one even at the present stage of the action. The alleged injuries were, I am told, sustained at a shooting party; it is not suggested that the shooting was intentional. The practical issue is whether, if the plaintiff was in fact injured by a shot from a gun fired by the defendant, the onus lies upon the plaintiff to prove that the defendant was negligent, in which case, under the modern system of pleading, he must so plead and give particulars of negligence (see R.S.C., Ord. 19, r. 4), or whether it lies upon the defendant to prove that the plaintiff's injuries were not caused by the defendant's negligence, in which case the plaintiff's statement of claim is sufficient and discloses a cause of action (see R.S.C., Ord. 19, r. 25). The issue is thus a neat one of onus of proof.

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[1] (1773) 3 Wils.K.B. 403.

[2] [1932] A.C. 562; 48 T.L.R. 494.

* The presence or absence of the snail was never judicially determined. The action was settled before the issues of fact were tried. K. D.

I am much indebted to counsel on both sides for their diligence and erudition in tracing the history of the distinction between trespass vi et armis and trespass on the case before the passing of the Judicature Acts, 1873 and 1875. I do not think it necessary, however, to examine in detail the earlier controversies alluded to by Lord Ellenborough in *Covell* v. *Laming*[3] as to whether trespass lay at all when the injury was unintentional, even although it was direct. That it did must be regarded as settled in 1803 by *Leame* v. *Bray*,[4] which decided that trespass vi et armis could lie wherever the personal injury complained of arose directly from the act of the defendant himself. The converse proposition that trespass on the case did not lie where the injury was direct, even although it was unintentional, which at first sight appeared to be established in 1794 by *Day* v. *Edwards*,[5] had been swept away at least by 1833 when the Court of Common Pleas in *Williams* v. *Holland*,[6] distinguishing—if not riding rough-shod over—*Day* v. *Edwards*,[7] held that an action on the case was an available remedy in such a state of facts. Pausing, therefore, at the convenient date of 1852, when the Common Law Procedure Act was passed, it was well established that where personal injury was caused to the plaintiff by the direct act of the defendant himself, alternative remedies in trespass to the person and in negligence were available.

What by that date was the essential difference between the two alternative remedies based on identical facts? It is fashionable today to regard trespass to the person as representing the historic principle that every man acts at his peril and is liable for all the consequences of his acts; negligence as representing the more modern view that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others: see *per* Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[8]

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[3] (1808) 1 Camp. 497.

[4] (1803) 3 East 593.

[5] (1794) 5 Term Rep. 648.

[6] (1833) 10 Bing. 112.

[7] 5 Term Rep. 648.

[8] [1947] A.C. 156, 170; 62 T.L.R. 646; [1946] 2 All E.R. 471.

But however true this may have been of trespass in medieval times—and I respectfully doubt whether it ever was—the strict principle that every man acts at his peril was not applied in the case of trespass to the person even as long ago as 1617. It is true that in that year, in the much-cited case of *Weaver* v. *Ward*,[9] which arose out of a shooting accident during an exercise of trained bands, the Court of King's Bench held that a plea that "the defendant casualiter et per infortuniam et contra voluntatem suam, in discharging of his piece did hurt and wound "the plaintiff" was demurrable. But it would seem that this was because the plea, which was a special plea, was insufficient because, although it denied intention, it did not negative negligence on the part of the defendant. It is clear from the report that the court was of opinion that the action of trespass to the person would fail if it should appear that the accident was "inevitable and that the defendant had committed no negligence "to give occasion to the hurt."

This phrase is repeated in many of the later cases. Where it appears, however, it must be read in its historical context and not as if it were being used by judges to whom modern concepts of negligence, contributory negligence and causation were familiar. An examination of the cases up to 1842 in which this or a similar phrase was adopted shows, I think, that the word "inevitable" was superfluous, and that the phrase meant no more than that the accident could not have been avoided by the exercise of reasonable care on the part of the defendant. In the difficult case of *Hall* v. *Fearnley* [10] in 1842, reported in very different terms in the Queen's Bench Reports, and in the Law Journal Reports, Lord Denman C.J. and Wightman J. appear to have regarded "inevitable" as something different from absence of negligence on the part of the defendant, but did not suggest that such absence of negligence was not in itself a defence. In any event, I can find no trace in the cases from the seventeenth century onwards that a defendant, in order to escape liability for unintentional trespass to the person, must comply with any higher standard of care than was needed to escape liability if the action were framed in trespass on the case. So, too, it appears to have been taken for granted by the beginning of the nineteenth century that contributory negligence—although not under that name, which is of more recent origin—disentitled the plaintiff to recover whether the action were framed in case, as in *Butterfield* v. *Forrester*,[11] or in trespass to the person, as in *Knapp* v. *Salsbury*.[12]

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[9] (1617) Hob. 134.

[10] (1842) 3 Q.B. 919; 12 L.J.Q.B. 22.

Apart from the question of onus of proof, which I must now examine, there does not appear by 1852 to have been any difference between the substantive law applicable whether the action were framed in trespass on the case or trespass to the person. Differences as regards pleading were, of course, in those days, vital, but are not relevant for the purposes of the present case in 1959, except in so far as they throw any light upon where the onus of proof lay.

In trespass on the case the onus of proof of the defendant's negligence undoubtedly lay upon the plaintiff. Where it lay in trespass is much more difficult to determine. The defence that the accident "was inevitable and that the defendant had committed no negligence to give occasion to the hurt" was available to the defendant upon a plea to the general issue by the end of the seventeenth century: see *Gibbons* v. *Pepper*[13]; and this appears to have been accepted by the Court of Common Pleas as late as 1823: see *Wakeman* v. *Robinson*[14]—a case still cited as authority in the third edition of Bullen & Leake in 1868. Since the plea to the general issue merely denied the existence of the necessary ingredients of the tort, this would suggest that in the case of trespass to the person the onus lay upon the plaintiff to show that the defendant's act was either intentional or negligent. Lord Ellenborough, on the other hand, sitting at nisi prius in 1810, had already decided in *Knapp* v. *Salsbury*[15] that such a defence must be specially pleaded, and the Court of King's Bench in 1842 in *Hall* v. *Fearnley*[16] appears to have come down on the pleading point on the side of Lord Ellenborough, although the differences between the two reports of this case make it difficult to elicit the ratio decidendi. But although the two last-cited cases destroy the force of any inference as to onus of proof which might be drawn from *Gibbons* v. *Pepper*,[17] they do not themselves give rise to the contrary inference. With the growth of special pleading, and in particular after the "general rules" of Hil. Term, 1834, there were many matters the onus of proof of which, if disputed, lay upon the plaintiff, which were not regarded as traversed by a plea to the general issue: see Bullen & Leake, 3rd ed., pp. 699–704.

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[11] (1809) 11 East 60.
[12] (1810) 2 Camp. 500.
[13] (1694) 1 Ld.Raym. 38.
[14] (1823) 1 Bing. 213.
[15] 2 Camp. 500.
[16] 3 Q.B. 919.
[17] 1 Ld.Raym. 38.

I do not find the pre-Common Law Procedure Act, 1852, cases conclusive or, indeed, helpful as to where the onus of proof of the defendant's negligence or absence of negligence lay where the action was founded upon trespass to the person and not on trespass on the case. The reported cases turn upon points of pleading, a science upon which the legal mind was then wonderfully concentrated, and when, in any particular case, that science had achieved its object in arriving at an issue of fact for the jury in an action of trespass to the person, it could only be very rarely that the question of onus of proof was crucial. Since trespass to the person only lay where the injury to the plaintiff was the direct consequence of the personal act of the defendant, proof that the defendant did the act and that the plaintiff was thereby injured would normally be prima facie evidence of the defendant's negligence sufficient also to sustain an action on the case in accordance with the common-sense view applied at nisi prius long before Pollock C.B. in *Byrne* v. *Boadle*[18] translated it into Latin as res ipsa loquitur. At the time the case came before the jury, therefore, there can have been little practical difference between trespass and case, even if in the former the onus of negativing negligence did lie upon the defendant, while in the latter the onus of proving negligence lay upon the plaintiff. But whatever the reason, I can find no trace in the reports that the possibility that the onus of proof might be different in the two classes of cases was a question which ever occurred to the judges of those days, or that their charge to the jury differed according to whether the action were framed in trespass or in case.

The majority of pre-Common Law Procedure Act cases in which the question of unintentional trespass to the person or to goods was discussed were, it is true, cases of collision on the highway either on land or on water. There is, however, no suggestion that I can find in any of the judgments that this was a relevant consideration, or that the law as to trespass vi et armis to the person or to goods was different according to whether the injury took place on a highway or not. Prima facie, therefore, one would suppose that the onus of proof lay upon the same party to the action in either case. If, then, it is conceded—as all agree that it must be at any rate today—that in the case of an involuntary trespass to the person on a highway the onus of proving negligence lies on the plaintiff, why should it be otherwise when

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[18] (1863) 2 H. & C. 722.

1959

Fowler v. Lanning.

Diplock J.

the involuntary trespass to the person is not committed on a highway? There is, nevertheless, a formidable body of academic opinion—but not, I think, any binding judicial authority—that highway cases have in the last 100 years become an exception to a previously existing general rule that the onus of proof of absence of negligence on the part of a defendant in a case founded on trespass to the person lies upon the defendant himself.

As I have already said, I do not think that the cases prior to the Common Law Procedure Act, 1852, establish that there ever was such a general rule, nor do I think that the subsequent cases, on analysis, suggest that those judges who were familiar with the procedure before 1852 took the view that there ever had been such a rule. The dictum of Blackburn J. in *Fletcher* v. *Rylands* [19] is generally regarded as the origin of some modern rule special to highways. But what he said in a case which, after all, was about the flooding of coal mines, was not limited to accidents on highways or to trespass to the person.[20] "Traffic "on highways, whether by land or sea, cannot be conducted with- "out exposing those whose persons or property are near it to "some inevitable risk; and that being so, those who go on the "highway, or have their property adjacent to it, may well be "held to do so subject to their taking upon themselves the "risk of injury from that inevitable danger." So far he is dealing with highway accidents and with trespass to land as well as with trespass to the person. But he goes on: " . . . and "persons who by the licence of the owner pass near to ware- "houses where goods are being raised or lowered, certainly do "so subject to the inevitable risk of accident. *In neither case,* "*therefore, can they recover without proof of want of care or* "*skill occasioning the accident*; and it is believed that all the "cases in which inevitable accident has been held an excuse for "what prima facie was a trespass, can be explained on the same "principle, viz., that the circumstances were such as to show "that the plaintiff had taken that risk upon himself."

Here is no sudden emergence of a rule peculiar to highways, but a rationalisation of what appeared to Blackburn J. to be well-settled law by explaining it on the basis—of which there is no trace to be found in the cases to which he refers—of the voluntary acceptance of risk by the plaintiff. It is to be noted that he refers specifically to warehouse cases, which are not highway cases, and among the other cases alluded to in which

[19] (1866) L.R. 1 Ex. 265.

[20] Ibid. 286, 287.

"inevitable accident has been held an excuse for what prima facie "was a trespass"[21] must be included, although it was not expressly cited, *Weaver* v. *Ward*[22]—the trained band shooting accident—in which the Court of Common Pleas expressed that view. But what is even more germane to the matter which I have to decide is that that great lawyer, who, having been called to the Bar in 1838 and to the Bench in 1859, must have been very familiar with the practice at nisi prius, appears in the passage italicised to have regarded it as a commonplace that, in all cases in which inevitable accident is an excuse for what, prima facie, was a trespass, the onus of proving negligence lies upon the plaintiff.

Nine years later, in *Holmes* v. *Mather*,[23] an equally great common lawyer, Bramwell B., stated the same proposition quite generally: "The result of the cases is this, and it is intel-"ligible enough: if the act that does an injury is an act of "direct force vi et armis, trespass is the proper remedy (if there "is any remedy) where the act is wrongful either as being wilful "or as being the result of negligence. Where the act is not "wrongful for either of those reasons no action is maintainable, "though trespass would be the proper form of action if it were "wrongful." I am aware of the textual criticism to which this passage has been subjected by the learned editor of the current edition of Pollock on Torts. But the Law Reports version was, I suspect, then, as now, corrected by the judge. Furthermore, the conclusion stated by Bramwell B. to be the result of the cases up to 1875 accords not only with what my own examination of them suggests, but also with what Blackburn J. had said in 1866. Two years later, in 1877, the speech of Lord Blackburn in *River Wear Commissioners* v. *Adamson*[24] applied to trespass to property adjoining a navigable water the principle which he had adumbrated obiter in *Fletcher* v. *Rylands*[25] in relation to trespass to property adjacent to a highway. This speech, since it is directed to trespass to land and not to trespass to the person, would, strictly speaking, be irrelevant to the present case were it not for the fact that it seems to have been regarded as authority for the proposition that in all cases of trespass to the person, to goods, or to land, there is a special rule peculiar to highways: see *per* McCardie J. in *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.*[26] No doubt there is a special rule as respects trespass to land adjoining a highway; but there is no reason to suppose that Lord Blackburn in *River Wear Commissioners* v. *Adamson*[27] was dealing with any other tort than trespass to land, or seeking to modify in relation to trespass to the person the generality of his observations in *Fletcher* v. *Rylands*,[28] or those of Bramwell B. in *Holmes* v. *Mather*.[29]

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[21] L.R. 1 Ex. 265, 287.
[22] Hob. 134.
[23] (1875) L.R. 10 Ex. 261, 268.
[24] (1876) 2 App.Cas. 743, 767.
[25] L.R. 1 Ex. 265, 286, 287.
[26] [1924] 2 K.B. 75, 82.

This brings me to *Stanley* v. *Powell*,[30] a case of a shooting accident, not on a highway, in which Denman J. held that trespass to the person would not lie in the absence of negligence by the defendant. The action was originally pleaded in negligence, the onus of proof of which undoubtedly lay upon the plaintiff, and the jury had found that there was no negligence—or, I suppose, more accurately, that the plaintiff had not proved any negligence on the part of the defendant. There are phrases in the judgment of Denman J. which can be read as suggesting that his view was that, had the action been framed in trespass to the person, the onus of negativing negligence would have lain upon the defendant. But this can hardly have been present to his mind or he would presumably have ordered a new trial. I regard the decision as neutral on the question of onus of proof.

Stanley v. *Powell*,[30] although assailed by some textbook writers, has stood for nearly 70 years. It was approved by all members of the Court of Appeal in *National Coal Board* v. *Evans*[31] —an approval which, it may be, was obiter. I have, however, no doubt that the decision in *Stanley* v. *Powell*[32] is good law.

Little assistance is to be obtained from any later cases. Since *Stanley* v. *Powell*,[32] and perhaps as a result of that decision, there appears to be no case in the reports where unintentional trespass to the person has been relied upon as distinct from negligence, despite the encouragement of the learned authors of the article on Trespass and Negligence in the Law Quarterly Review in 1933 (45 Law Quarterly Review 359), and the continued appearance in successive editions of Bullen & Leake of a precedent of a pleading in trespass to the person in which neither intention nor negligence is alleged. No doubt in many cases it is the master who is sued for the act of his servant, and here trespass as opposed to case would never lie; but in the 68 years which have passed since *Stanley* v. *Powell*[32] there must have been many cases where the injury to the plaintiff was the direct consequence of the act of the defendant himself. But no practitioner seems to have thought, and certainly no court has decided, that to do so would affect the onus of proof.

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[27] 2 App.Cas. 743.
[28] L.R. 1 Ex. 265, 286, 287.
[29] L.R. 10 Ex. 261, 268.
[30] [1891] 1 Q.B. 86.
[31] [1951] 2 K.B. 861; [1951] 2 T.L.R. 415.
[32] [1891] 1 Q.B. 86.

I think that what appears to have been the practice of the profession during the present century is sound in law. I can summarise the law as I understand it from my examination of the cases as follows:

(1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.

(2) Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place.

(3) If it were right to say with Blackburn J. in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (i.e., injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful—of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples. For Blackburn J., in the passage I have quoted from *Fletcher* v. *Rylands*,[33] was in truth doing no more than stating the converse of the principle referred to by Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*,[34] that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.

(4) The onus of proving negligence, where the trespass is not intentional, lies upon the plaintiff, whether the action be framed in trespass or in negligence. This has been unquestioned law in highway cases ever since *Holmes* v. *Mather*,[35] and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases. It is, indeed, but an illustration of the rule that he who affirms must prove, which lies at the root of our law of evidence.

I am glad to be able to reach this conclusion, and to know that the Supreme Court of British Columbia has recently done the same (*Walmsley* v. *Humenick*[36]), for "while admiring the "subtlety of the old special pleaders our courts are primarily

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[33] L.R. 1 Ex. 265, 286, 287.

[34] [1947] A.C. 156, 170.

[35] L.R. 10 Ex. 261, 268.

[36] [1954] 2 D.L.R. 232.

"concerned to see that rules of law and procedure should serve "to secure justice between the parties": *per* Lord Simon in *United Australia Ltd.* v. *Barclays Bank Ltd.*[37]

If, as I have held, the onus of proof of intention or negligence on the part of the defendant lies upon the plaintiff, then, under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies upon negligence, he must state the facts which he alleges constitute negligence. Without either of such allegations the bald statement that the defendant shot the plaintiff in unspecified circumstances with an unspecified weapon in my view discloses no cause of action.

This is no academic pleading point. It serves to secure justice between the parties. If it is open to the plaintiff—as Mr. McCreery must, I think, contend—on the pleadings as they at present stand to prove that the defendant shot him deliberately, failure to allege such intention deprives the defendant of his right to apply to stay the action pending prosecution for the felony: *Smith* v. *Selwyn.*[38] I should repeat that there is, of course, in fact no suggestion that the shooting here was intentional, and thus felonious. But if Mr. McCreery be right, proof of intention would be open upon the pleading in its present form.

Turning next to the alternative of negligent trespass to the person, there is here the bare allegation that on a particular day at a particular place "the defendant shot the plaintiff." In what circumstances, indeed with what weapon, from bow and arrow to atomic warhead, is not stated. So bare an allegation is consistent with the defendant's having exercised reasonable care. It may be—I know not—that, had the circumstances been set out with greater particularity, there would have been disclosed facts which themselves shouted negligence, so that the doctrine of res ipsa loquitur would have applied. In such a form the statement of claim might have disclosed a cause of action even although the word "negligence" itself had not been used, and the plaintiff in that event would have been limited to relying for proof of negligence upon the facts which he had alleged. But I have today to deal with the pleading as it stands. As it stands, it neither alleges negligence in terms nor alleges facts which, if true, would of themselves constitute negligence. If Mr. McCreery is right, he would be entitled to prove that the defendant's gun was to his knowledge defective or even that he was short-sighted and had left his spectacles at home, nor would the plaintiff be bound at any time before the trial to disclose to the defendant what facts he relies upon as constituting negligence.

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[37] [1941] A.C. 1, 22; 57 T.L.R. 13; [1940] 4 All E.R. 20.

[38] [1914] 3 K.B. 98.

I do not see how the plaintiff will be harmed by alleging now the facts upon which he ultimately intends to rely. On the contrary, for him to do so will serve to secure justice between the parties. It offends the underlying purpose of the modern system of pleading that a plaintiff, by calling his grievance "trespass to "the person" instead of "negligence," should force a defendant to come to trial blindfold; and I am glad to find nothing in the authorities which compels justice in this case to refrain from stripping the bandage at least from the defendant's eyes.

I hold that the statement of claim in its present form discloses no cause of action.

Leave to make immediate amendments to statement of claim granted. Consequential amendments to defence within 14 days.

Solicitors: *Barnes & Butler for J. W. Miller & Son, Poole; Peacock & Goddard for Trevanion, Curtis & Walker, Bournemouth.*

J. D. P.

BAXTER v. STOCKTON-ON-TEES CORPORATION AND ANOTHER.

[1956 B. 1596.]

C. A.

1958
May 16, 19, 20, 21;
June 23.

Jenkins, Parker and Pearce L.JJ.

Highway — Non-feasance of local authority — New road — Statutory vesting in local authority—Accident caused by projecting kerb of island adjacent to roundabout—Negligence—Highway constructed by county council and subsequently vesting in local authority—Liability of local authority in claim for damages—Development and Road Improvement Funds Act, 1909 (9 *Edw.* 7, *c.* 47), *s.* 10 *—Local Government Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 17), *s.* 32.

The plaintiff's husband was killed when a motor-cycle which he was riding at night on a highway collided with the kerb of an approach island adjacent to a roundabout. In her action for damages in respect of the death of her husband against the defendants, as the authority responsible for the highway in question at the date of the accident, the plaintiff claimed, in effect, that the accident was brought about by the negligence of the defendants as highway authority, in that the approach island was so shaped and

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sited that a part of it projected into the carriageway along which the deceased was riding, but that the defendants nevertheless failed to light it or to give users of the highway warning (by means of traffic signs or otherwise) of the existence of the projection, and that this amounted to a concealed danger or trap.

The highway was constructed between 1938 and 1940 by the Durham County Council under sections 8 and 10 of the Development and Road Improvement Funds Act, 1909,[1] and was taken over by the defendants in 1941 under section 32 of the Local Government

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[1] Development and Road Improvement Funds Act, 1909 (as amended by the Roads Act, 1920), s. 8: "*Powers of Minister of Transport.* "(1) The Minister of Transport shall "have power, with the approval of the "Treasury—(*a*) to make to any high-"way authority advances in respect of "the construction of new roads or the "maintenance or improvement of "existing roads, or to make such "advances, in conjunction with a "highway authority, to any company "or person."

S. 10: "(1) Where the Minister "of Transport makes an advance to a "highway authority in respect of the "construction of a new road, the "Minister may authorise the autho-"rity to construct the road, and "where so authorised the highway "authority shall have power to con-"struct the road and to do all such "acts as may be necessary for the "purpose, and any expenses of the "authority, so far as not defrayed out "of the advance, shall be defrayed as "expenses incurred by the authority "in exercise of their powers as high-"way authority, and the enactments "relating to such expenses, including "the provisions as to borrowing, shall "apply accordingly. (2) Where the "highway authority to whom the "advance is made are a county coun-"cil, the new road, when constructed, "shall be a main road and in "any other case shall be a highway "repairable by the inhabitants at "large: Provided that the main-"tenance of any such road within the "administrative County of London "shall devolve upon the local autho-"rity responsible for the maintenance "of streets and roads in whose dis-"trict the same is situate."

Local Government Act, 1929, s. 29: "(1) The council of every county shall "be the highway authority as respects "every road in the county which at "the appointed day [April 1, 1930] is "a main road, or which would, apart "from this section, at any time there-"after have become a main road, and "every such road . . . shall be termed "a county road, and all enactments "relating to main roads shall as from "the appointed day have effect as if "for references therein to main roads "there were substituted references to "county roads."

S. 32: "*Rights of certain urban "district councils to maintain county "roads.* (1) Where an urban district "has a population exceeding twenty "thousand, the urban district council "may claim to exercise the functions "of maintenance and repair of any "county road within their district, "and if a claim is made within the "time hereinafter limited, then, as "from such date as is hereinafter "mentioned, the urban district council "shall be entitled to exercise those "functions, and the road shall vest in "that council, and for the purpose of "the maintenance, repair and im-"provement of, and other dealing "with, any such road, that council "shall have the same functions as if "they were as respects that road the "highway authority and the road "were an ordinary road vested in "them. (2) Such claim as aforesaid "must be made— . . . (*e*) in the case "of any road which becomes a county "road after the appointed day, or "after the date mentioned in any of "the last three foregoing paragraphs, "as the case may require, within "twelve months after the date when "it so becomes a county road."

Act, 1929, complete with roundabout, islands, lights and traffic signs; and it had remained unaltered since that date:—

Held, that on the assumption that the defendants were in any way at fault in respect of the approach island, that fault consisted exclusively of non-feasance; that, accordingly, if the defendants were to be held liable it could only be by virtue of some express words in the Act under which the road became vested in them; but that there was nothing in section 32 of the Local Government Act, 1929, to impose on an urban district council taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance, and that, therefore, the plaintiff's action must necessarily fail.

Cowley v. *Newmarket Local Board* [1892] A.C. 345; 8 T.L.R. 788 applied.

Fisher v. *Ruislip-Northwood Urban District Council and Middlesex County Council* [1945] K.B. 584; 62 T.L.R. 1; [1945] 2 All E.R. 458 and *Nash* v. *Rochford Rural District Council* [1917] 1 K.B. 384 considered.

Per curiam: When a highway authority constructs out of public funds a new road for the use of the public under the statutory powers delegated to the authority by the Minister under section 10 of the Development and Road Improvement Funds Act, 1909, and opens it to the public on completion, there is no question of the dedication of the road to the public by the constructing highway authority and the immunity afforded to a private owner of land who dedicates it as a public highway has no application to such a case. On the contrary, a highway authority constructing a road for the use of the public under statutory powers is under a positive duty to take reasonable care to construct it properly. But it does not follow therefrom that the exemption from liability in damages for mere non-feasance does not extend to the highway authority for the time being responsible for its maintenance. The exemption undoubtedly applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways, unless it is excluded by the terms of some special enactment.

Decision of Barry J. reversed.

APPEAL from Barry J. sitting at Durham Assizes.

The facts are taken from the judgment of the court.

This was an appeal by the Stockton-on-Tees Corporation from a judgment of Barry J. dated November 4, 1957, whereby he awarded the plaintiff, Eileen Elizabeth Baxter, a total of £4,500 damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants as the highway authority responsible for the highway known as Fleet Bridge Road in the County of Durham, in respect of the death of her husband, Alexander Ralph Baxter, from injuries sustained by him when a motor-cycle on which he was riding at night along Fleet Bridge Road came into collision with the kerb of an approach island adjacent to the Portrack Roundabout. The basis of the claim was (in effect) that the accident was brought about by the negligence of the defendants as highway authority, in that the approach island was so shaped and sited that the part of it with which the motor-cycle collided projected into the carriageway along which the deceased was riding, but the defendants nevertheless failed to light the island or the part of it so projecting, or to give users of the highway (including the deceased) warning (by means of traffic signs or otherwise) of the existence of the projection, which amounted to a concealed danger or trap.

The accident took place at about midnight on October 14/15, 1955, when the plaintiff's husband, a company quartermaster sergeant in the Royal Army Service Corps, and a highly skilled motor-cyclist, was riding his motor-cycle eastwards along the Fleet Bridge Road on his way from Norton, near Billingham, to Middlesbrough. In order to reach Middlesbrough he had to negotiate the Portrack Roundabout, situated at the point where the Haverton Hill Road is intersected by the Fleet Bridge Road and its continuation towards Middlesbrough known as the Tees (Newport) Bridge Approach Road, which takes off from the roundabout nearly opposite the point at which the Fleet Bridge Road enters it.

Where it approaches the roundabout the Fleet Bridge Road is laid out as a dual carriageway by means of a central strip of grass edged with concrete kerbing, the northern carriageway being reserved for eastbound, and the southern for westbound, traffic. At the point of junction of the Fleet Bridge Road with the roundabout the central strip ends on the western side of an accommodation road joining the two carriageways, and immediately beyond that comes the relevant approach island. This was a plot of grass in the shape of an irregular quadrilateral bordered by concrete kerbing some 4 inches high, its western and shortest side forming the eastern side of the accommodation road, its southern side in line with the kerbing on the south side of the central strip, its eastern side facing the central island of the roundabout and its northern side (the one with which the motor-cycle collided) slanting or splayed outwards (or to the left from the point of view of eastbound traffic) from the line of the northern kerb of the central strip at a fairly pronounced angle. This slant or splay, though to a great extent compensated by a more gradual curve of the opposite side of the northern carriageway in the same direction, would give the effect to a person driving along the middle or right-hand side of the northern carriageway of a sudden turning of the off-side kerb diagonally across his front. Shortly before it reaches the approach island the northern carriageway makes a very slight turn to the right.

As regards lighting and traffic signs at the time of the accident, there was a number of street lamps illuminated by gas disposed about the outer perimeter of the roundabout, but these were operated on the half-night system, which means that they were automatically turned off at 11 p.m. On the perimeter of the central island of the roundabout there were four illuminated keep-left bollards, one facing down the northern carriageway of Fleet Bridge Road, one down the southern (or incoming) carriageway of Tees (Newport) Bridge Approach Road (which was also laid out as a dual carriageway), and one down each of the two sections of the intersected Haverton Hill Road (which were not dual carriageways). These four bollards were accompanied by reflecting arrows pointing to the left. There was also an illuminated keep-left bollard on each of the approach islands. In the case of Fleet Bridge Road the bollard on the approach island faced diagonally to the right from the point of view of eastbound traffic, for the purpose of guiding westbound traffic into the southern carriageway, and could not be seen by anyone travelling east. The bollard on the approach island, in the case of the other dual carriageway, was similarly faced from the point of view of westbound traffic to guide eastbound traffic into its proper path. The shape and positioning of this approach island was very much the same as in the case of Fleet Bridge Road, but the leftward slant or splay was perhaps somewhat less pronounced. The two sections of Haverton Hill Road, not being dual carriageways, were each provided with a central approach island on which was mounted an illuminated keep-left bollard facing down the road by way of warning to incoming traffic. The dual carriageway in the case of the Tees (Newport) Bridge Approach Road appears to have begun only a short distance from the roundabout, and its beginning was marked by another illuminated keep-left bollard facing down the road. Each of the four roads had on its near side coming in towards the roundabout an advance direction sign with reflector studs. In the case of Fleet Bridge Road, however, this sign was sited some 20 feet to the left of the carriageway.

There were some red lamps placed round the central island to warn of certain work in progress, but there was a doubt whether these were alight at the material time and it was agreed that they should be disregarded for the purposes of this case.

The deceased was accompanied on his abortive trip to Middlesbrough by a friend, Sergeant Stockdale, also of the R.A.S.C. They had met at a dance at Norton, and agreed to go on to some other attraction in Middlesbrough. The deceased led the way on his motor-cycle, Sergeant Stockdale following in a small car. The deceased's headlight was burning brightly, though apparently there was some question as to the condition of his dynamo. They set off, with the deceased leading at perhaps 35 miles per hour. Sergeant Stockdale lost sight of the deceased before they reached the roundabout (which was only about a mile from the hall where the dance was held) but attributed this to the fact that he slowed down because the road surface was bumpy. There was some degree of mist over the roundabout, which Sergeant Stockdale attributed to the I.C.I. works nearby. Sergeant Stockdale went on to Middlesbrough without seeing the deceased again, and waited for him there in vain.

A police constable on his way home from duty soon after midnight found the deceased lying on the central island of the roundabout near the keep-left bollard facing down Fleet Bridge Road, seriously injured, with his machine lying on the same island some 15 feet away. The deceased shortly afterwards died.

Another police constable who came on the scene a little later made a sketch plan based on his inspection of the area. This showed marks on the projecting kerbs and on the ring-road of the roundabout indicating that the motor-cycle struck the kerb much where one would expect it to strike if the deceased had been driving straight along the middle of the northern carriageway, and had continued in that line without observing the slant or splay of the approach island towards his left; and that the impact was such that the motor-cycle jumped the island, landing in the ring-road, and then bouncing or running on out of control to the place at which it was found on the central island, throwing the deceased at some stage in its course to the point where he was found near the keep-left bollard.

The Fleet Bridge Road was constructed between 1938 and 1940 by the Durham County Council under sections 8 and 10 of the Development and Road Improvement Funds Act, 1909. The construction of this new road was projected in 1933, but apparently no funds for the purpose were available at that time. The plans were re-submitted by the Durham County Council to the Ministry of Transport in 1936 and approved by the Minister in 1937 when a 74 per cent. grant was authorised. Work on the road was begun towards the end of 1938 and it was finished in 1940. It was not in dispute that the completed road (including the roundabout) was in conformity with the approved plans, and it was not disputed that the gas lamps, keep-left bollards, reflecting arrows, and advance direction signs were installed in the positions in which they stood at the time of the accident. The defendants took over the Fleet Bridge Road from the county council in 1941 under section 32 of the Local Government Act, 1929.

The county council were in the first instance joined as defendants, but proceedings were later discontinued against them, no doubt because it had become clear that by reason of its transfer to the borough council the county council had long since ceased to be in any way responsible for the road.

From the time when they took over the road until the time of the accident to the deceased the defendants did not make any alterations to the roundabout or its approaches or the lights and traffic signs. They simply took over the road, roundabout, islands, lights, traffic signs, and all, from the Durham County Council and left them as they were, though no doubt doing what was necessary in the way of maintenance.

The road, which carried considerable traffic, was, so far as was known, used without accident from its completion in 1940 down to August 9, 1954, a matter of 14 years. On the latter date there was an accident in which a motor-cyclist collided with the same approach island, and there was another accident on May 19, 1955, in which something similar happened to a car. One of the police witnesses gave evidence about these two accidents from the police records, but no details were forthcoming as to the circumstances in which they took place.

Phineas Quass Q.C., *R. Withers Payne* and *R. A. R. Stroyan* for the corporation. The appeal raises the questions: (1) What duty, if any, is owed by a highway authority, which constructs a road, to the users thereof? (2) In the present case, has that duty, if any, been transferred to the defendants upon the road being vested in them? Both these questions must be considered against the background that no action will lie against any authority intrusted with the care of highways for damage suffered as a result of an omission to keep the highway in repair, that is, there is no liability for non-feasance as distinct from misfeasance.

This highway was constructed by the Durham County Council under sections 8 and 10 of the Development and Road Improvement Funds Act, 1909, and it was taken over within a year of its completion by the defendant corporation pursuant to section 32 of the Local Government Act, 1929, complete with roundabout, islands, lights and traffic signs; and it has remained unaltered since it was so transferred.

At common law ordinary highways were repairable by the inhabitants of the parish at large. The Highways and Locomotives (Amendment) Act, 1878, provided for the creation of main roads (see sections 13 and 15), and by section 29 of the Local Government Act, 1929, such roads were to be termed county roads. The county council is the highway authority for all county roads except those (including the road here in question) over which an urban district council have claimed to exercise the functions of maintenance and repair: section 32 of the Local Government Act, 1929.

The trial judge held that the approach island constituted an obstruction of the highway, but it is submitted that in fact it is a *part of the highway*. In any event, even if it be considered an obstruction, it does not follow that because the county council were under a statutory duty to maintain the island they were thereby under a duty to warn users of the highway of its existence: see *per* Lord Parker of Waddington and Lord Sumner in *Great Central Railway* v. *Hewlett*.[2] Further, statutory powers and duties to maintain and repair a highway do not extend to lighting it: see *Lanarkshire* (*Lower Ward*) *Road Trustees* v. *Kelvinside Estate Trustees*.[3]

A highway authority which constructs a new road under statutory powers, and on its completion throws it open to the public, thereby dedicates it to the public, who take it subject to all hazards and inconveniences existing upon it at the time of such dedication. The dictum of Bailhache J. in *Thompson* v. *Bradford Corporation and Tinsley*[4] that it is the duty of a highway authority which makes a new road "to make it so that when "the road is open to the public for public use the road shall be "reasonably safe for the purposes for which it is intended to be "used" is not in accordance with the law. There is no obligation on the maker of a new road to make it fit for the users thereof. It is not contended that *Thompson's* case[5] was wrongly decided,

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[2] [1916] 2 A.C. 511, 519, 521 et seq.

[3] (1886) 14 Rettie (H.L.) 18.

[4] [1915] 3 K.B. 13, 21.

[5] Ibid.

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but it is submitted that the scope of the decision is correctly stated in Pratt & Mackenzie's Law of Highways, 19th ed., p. 288, under the heading "Incomplete repairs"; see also Halsbury's Laws of England, 3rd ed., pp. 313, 314.

On the authority of *Nash* v. *Rochford Rural District Council* [6] and *Sheppard* v. *Glossop Corporation* [7] and the statute under which the present defendants took over this road, no liability can be cast upon them since they have done nothing to it other than carry out necessary work of maintenance subsequent to such taking over. [Reference was also made to section 2 of the Roads Improvement Act, 1925; sections 48 and 57 (2) of the Road Traffic Act, 1930; *Attorney-General (at the relation of Ormerod Taylor & Son Ltd.) and Ormerod Taylor & Son Ltd.* v. *Todmorden Borough Council*,[8] and *Quinn* v. *Ministry of Commerce and Armagh County Council*.[9]]

G. S. Waller Q.C. and *C. P. Heptonstall* for the plaintiff. It makes no difference to the questions for decision whether the approach island be considered as part of the highway or not. Good practice requires in respect of the roundabout as a whole that there should be (a) an advance warning sign; (b) reflector lights; (c) the presence of a solid white line; (d) bollards; (e) a roundabout sign. Unless some or all of these steps were taken, this approach island was a source of danger to the public and, it may be, constituted a nuisance to the public. In particular, it was a source of danger to motor-cyclists. The fact that the plan of the roundabout was approved by the Minister is irrelevant. Section 3 of the Trunk Roads Act, 1936, provides for trunk roads to be under the control of the Minister. If this road had been a trunk road, and this roundabout had been constructed upon it without proper warning signs, it is submitted that on the facts of this case the Minister would have been liable just as the Durham County Council would have been liable if the road were still vested in them.

Reliance is placed on the following propositions: (1) Where statutory powers are conferred, they must be exercised with reasonable care, and if an accident occurs owing to a failure to exercise such reasonable care, there will be liability in damages for negligence. (2) If there is power to construct a road with a roundabout and an approach island in it, and the island might be a source of danger, a duty lies on the constructor to prevent

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[6] [1917] 1 K.B. 384.

[7] [1921] 3 K.B. 132.

[8] [1937] 4 All E.R. 588.

[9] [1954] N.I. 131.

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it on its construction from becoming a source of danger to the public.

If Durham County Council were still the highway authority in respect of this road, they would have been responsible for this accident because they did not take reasonable steps to prevent the approach island from being a danger to the public: see the observations of Lord Hatherley and Lord Selborne on the proper exercise of statutory powers in *Geddis* v. *Proprietors of Bann Reservoir.*[10] *Great Central Railway* v. *Hewlett*[11] is distinguishable; the decision is limited to the special facts of that case and the private Act which was there under consideration; see also the argument[12] of Sir John Simon Q.C. for the appellants, who contended that in relation to the obstruction in question the appellants were exercising no statutory powers whatever and that there was therefore no relevant duty which had been broken. *Sheppard* v. *Glossop Corporation*[13] is also distinguishable. But the following passage in the judgment of Scrutton L.J.[14] assists the plaintiff here: "It is clear that if they [the corporation] had "placed in a highway an obstruction which might cause damage "in the dark to the public using the highway, then they would "be required either by lighting or other proper warning to give "notice of the obstruction. Or if they had constructed the high-"way and made it so that it ran along the edge of a precipice, "there might be a duty upon them to give to passengers notice "of the danger by warning or lighting or some other means."

This approach island was a source of danger at night in the absence of lighting or other form of warning, and, accordingly, the county council were under a duty to safeguard the public on the principle of *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council.*[15] While that case concerned the erection of an air-raid shelter on a highway pursuant to the Civil Defence Act, 1939, the principle involved is of general application. In any event, the language of section 10 of the Development and Road Improvement Funds Act, 1909, is indistinguishable in effect from the relevant provisions of the Civil Defence Act, 1939, there under consideration. The observations of Lush J. in *McClelland* v. *Manchester Corporation*[16] and of Bailhache J. in *Thompson* v. *Bradford Corporation and Tinsley*[17] are a correct statement of the law relating to the duty of a constructor of a highway towards users of it.

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[10] (1878) 3 App.Cas. 430, 450, 455.

[11] [1916] 2 A.C. 511.

[12] Ibid. 515.

[13] [1921] 3 K.B. 132, 138, 139, 143, 151.

[14] [1921] 3 K.B. 132, 144.

[15] [1945] K.B. 584.

[16] [1912] 1 K.B. 118, 127, 129.

[17] [1915] 3 K.B. 13, 21.

The defendants contended (a) that a road dedicated to the public must be taken with all faults; (b) this was a case of non-feasance, and, accordingly, the county council would not be liable for this accident if the road was still vested in them. The answer to this contention is that a highway may be created either by dedication and acceptance or by statute: see Pratt & Mackenzie's Law of Highways, 19th ed., pp. 12 and 13, and Halsbury's Laws of England, 3rd ed., vol. 19, pp. 43 and 60. The road in question was constructed under statutory powers and therefore no necessity for dedication arose. [Reference was made to *Rex* v. *Lyon*[18] and *Fisher* v. *Prowse*.[19]] In any event, the distinction sought to be made between misfeasance and non-feasance is irrelevant in the present case. The exemption from liability for non-feasance in this connection relates to *non-repair* of the highway and has no application to questions arising from the *construction* of the highway. [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 19, p. 149; Salmond on Torts, 12th ed., p. 238; *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.*[20]]

In the alternative, this is a case of misfeasance. The county council were under a duty to construct this approach island and to maintain it in such manner as to prevent it from becoming a danger to the public. That was a continuing duty and it was the failure to perform that duty which constituted the misfeasance. [Reference was made to *McClelland* v. *Manchester Corporation*.[21]]

The duty of the defendants to take reasonable steps to prevent the approach island from becoming a danger to the public was a continuing obligation which passed to the defendants under the terms of section 32 of the Local Government Act, 1929, when they took over the road. Further, the breach of duty by the county council to take such steps was a continuing breach. *Nash* v. *Rochford Rural District Council*[22] is distinguishable; it is entirely different from the present case in that it was a case of pure non-feasance.

[PARKER L.J. Is it now too late to hold that the doctrine of non-feasance and misfeasance should not be extended to roads constructed under the Act of 1909 and later Acts?]

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[18] (1825) 5 Dow. & Ry.(K.B.) 497, 499.

[19] (1862) 2 B. & S. 770, 779.

[20] [1953] Ch. 149, 188.

[21] [1912] 1 K.B. 118, 126, 127.

[22] [1917] 1 K.B. 384.

No. All the reported cases on this question appear to relate to roads which were originally ancient highways. *Skilton* v. *Epsom and Ewell Urban District Council* [23] demonstrates that the distinction between non-feasance and misfeasance is extremely narrow, and therefore this doctrine should not be extended, especially as it is now looked upon with disfavour by the courts. [Reference was also made to *Quinn* v. *Ministry of Commerce and Armagh County Council* [24] and *Lanarkshire (Lower Ward) Road Trustees* v. *Kelvinside Estate Trustees.*[25]]

Quass Q.C. in reply. As to the liability of the county council, the exemption of a highway authority from liability in damages for mere non-feasance is not confined to cases of non-repair of the highway: see *per* Lord Halsbury L.C. in *Cowley* v. *Newmarket Local Board.*[26] The obstruction cases, for example, *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council,*[27] do not assist the plaintiff, for a dual carriageway can in no sense be considered an obstruction. Further, there is a substantial difference between the language of the provision of the Civil Defence Act, 1939, in *Fisher's* case [27] and section 10 of the Development and Road Improvement Funds Act, 1909.

[PARKER L.J. *Baldwins Ltd.* v. *Halifax Corporation* [28] seems strongly to support the plaintiff's hypothetical case against the county council.]

There is nothing in the language of section 10 of the Act of 1909 to suggest that the legislature intended thereby to impose a new liability upon a highway authority, and it is for the plaintiff to establish that it was the intention of the legislature to impose such liability: see *per* Mathew J. in *Saunders* v. *Holborn District Board of Works.*[29]

[PARKER L.J. It would appear from an observation of Lord Herschell L.C., delivering the judgment of the Privy Council in *Municipal Council of Sydney* v. *Bourke.*[30] that an action would lie in misfeasance if the road in question had not been properly constructed.]

As to the liability of the defendants, it was contended that the county council were under a continuing duty to prevent the approach island from becoming a danger to the public, but there is nothing in the Act of 1909 to support that proposition. It was then said that the effect of section 32 of the Act of 1929 was to put the defendants in the same position as the county council. If that be so, then it is a fair comment that the language of the section is singularly inapt for that purpose. [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 19, pp. 149, 150; Pratt & Mackenzie's Law of Highways, 19th ed., pp. 291, 529; *Geddis* v. *Proprietors of the Bann Reservoir*[31]; *Great Central Railway* v. *Hewlett*[32]; *McClelland* v. *Manchester Corporation*[33]; *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.*[34]; *Quinn* v. *Ministry of Commerce and Armagh County Council*,[35] and *Attorney-General (at the relation of Ormerod Taylor & Son Ltd.) and Ormerod Taylor & Son Ltd.* v. *Todmorden Borough Council.*[36]]

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[23] [1937] 1 K.B. 112, 120.
[24] [1954] N.I. 131, 133.
[25] 14 Rettie (H.L.) 18.
[26] [1892] A.C. 345, 349, 350.
[27] [1945] K.B. 584.
[28] (1916) 85 L.J.K.B. 1769, 1771, 1772.
[29] [1895] 1 Q.B. 64, 68.
[30] [1895] A.C. 433, 435.

Cur. adv. vult.

June 23, 1958. JENKINS L.J., delivering the judgment of the court, stated the facts and continued: In these circumstances, it would appear to us that prima facie if the defendants were at fault at all in the matter of the approach island with which the deceased's motor-cycle collided, their fault consisted exclusively in non-feasance with no element of misfeasance whatever.

The judge found it possible to hold the defendants liable. On the facts, he formed an extremely serious view of the danger constituted during the hours of darkness by the projecting part of the approach island, with the arrangements in regard to lights and direction signs as they were at the time of the accident. Accepting to the full the various criticisms of it put forward on the plaintiff's side he described it as a dangerous trap. In fairness to the county council and the defendants we feel obliged to say that we think the judge took a somewhat exaggerated view of the danger. A person travelling the way the deceased was going would have to guide him (apart from the gas lamps up to 11 p.m.) the reflecting advance direction sign on his left, the illuminated keep-left sign and reflecting arrow to his front, and the light-coloured concrete kerb on his right. We should have thought that the driver of a car or motor-cycle with moderately good headlights or headlight and not travelling at excessive speed might reasonably be expected to pick up these indications unless the weather conditions were exceptionally bad. It was said that the advance direction sign was too far out to the left, and that a driver would not notice the keep-left bollard and arrow until he had made his turn to the left. It was also said that the very slight curve to the right before reaching the approach island added to the danger. We are not altogether convinced by these criticisms, and are impressed by the apparent record of 14 years without accident, the effect of which is not to our minds displaced by the bare fact of two accidents, one in 1954 and the other in 1955, with no information as to the circumstances in which they took place. Be that as it may, the judge, having found this to be a dangerous trap, went on to consider the question of liability. He began by rejecting (as we think, rightly) an argument raised by the defendants to the effect that when Fleet Bridge Road was completed and opened to the public the county council had dedicated the road as a public highway with the like legal consequences as attend the dedication of land as a public highway by a private owner. If this were right, then the consequences would ensue that the county council as dedicators of the road must be taken to have made it over to the public such as it was and subject to all hazards and inconveniences existing upon it at the time of dedication, and that neither they nor the defendants as their successors in the office of highway authority could be held liable for any damage arising from the approach island complained of, or under any obligation to obviate or mitigate that danger by lighting or traffic signs or other warning devices. We think it is plain that when a highway authority constructs out of public funds a new road for the use of the public under statutory powers delegated to the authority by the Minister pursuant to section 10 of the Act of 1909, and opens it to the public on completion, there is no question of the dedication of the road to the public by the constructing highway authority in any relevant sense of that expression. The highway authority in such a case constructs in exercise of the delegated statutory powers a road which, constructed as it is under those powers, cannot from first to last be anything else than a public highway, and comes into being as such. The immunity afforded to a private owner of land who dedicates it as a public highway in our view has no application to such a case. On the contrary, there is authority, to which we will later refer, for the proposition that a highway authority constructing a road for the use of the public under statutory powers is under a positive duty to take reasonable care to construct it properly.

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[31] 3 App.Cas. 430.
[32] [1916] 2 A.C. 511, 522.
[33] [1912] 1 K.B. 118.
[34] [1953] Ch. 149, 176.
[35] [1954] N.I. 131, 133.
[36] [1937] 4 All E.R. 588.

But it does not follow that because a public highway originated as a new construction under statutory powers, as opposed to originating from dedication by some private owner, therefore the exemption from liability in damages for mere non-feasance does not extend to the highway authority for the time being responsible for its maintenance. In the case of a new road constructed by a highway authority the constructing authority may, as already mentioned, be under a special duty to construct it properly, but apart from that the origin of the road appears to us to be in itself irrelevant to the application of the exemption in respect of mere non-feasance; and if the judge regarded the exemption as excluded by the circumstances of the present case, as at one point in his judgment he appears to suggest, we cannot agree with him. The exemption, as we think, undoubtedly applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways unless it is excluded by the terms of some special enactment, which is not the case here. The general principle is thus stated by Lord Halsbury L.C. in *Cowley* v. *Newmarket Local Board*[1]: " The facts were," says Lord Halsbury, " that the defendants are the Newmarket " Local Board of Health, and the footway and the highway " referred to were within the limits and under the care and " management of the defendants as such local board of health; " and the question appears to resolve itself into whether the " public authorities in whom the highways are vested by the " statute can be held liable in an action for any defect in the " repair. I think in this case the liability would have to be put " upon the ground that there was default in the construction " of the highways through which an accident happened to a " passenger. The wide consequences of the existence of such a " right of action would be very serious. As long ago as 1788 a " question of an analogous character was raised in the Court of " King's Bench; and the argument then as now, was that where " one person receives an injury by reason of any other person or " persons omitting to do that which by law he or they are bound " to do, he may maintain an action in the circumstances to recover " satisfaction for the damage he has received in consequence of " that omission. In that case it was said (which seems to me to " be decisive of this case) that the principle which decides against " this kind of action is accurately stated in Brooke's Abridgment, " tit. Action on the Case, pl. 93, where it is said that ' if an " ' highway be out of repair by which my horse is mired no action " ' lies, " car est populus et surra reforme per presentment," " ' which must be understood to mean that as the road ought to

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[1] [1892] A.C. 345, 349, 350; 8 T.L.R. 788.

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" 'be repaired by the public no individual can maintain an action " 'against them for any injury arising from their neglect': "*Russell* v. *The Men of Devon*." [2]

In *Municipal Council of Sydney* v. *Bourke* [3] the principle was applied to roads constructed in Sydney, New South Wales, under certain local enactments. Lord Herschell L.C., delivering the judgment of the Judicial Committee, said [4]: "It is admitted "that the highway on which the disaster occurred was constructed "by the appellants in the first instance quite properly. No "complaint of misfeasance is made against them. The sole "charge is one of non-feasance: that when the road had fallen "into a bad condition, they failed to execute the necessary repairs. "If, then, they are liable in the present action, it must be either "because that liability has been expressly imposed by some "enactment, or because the legislature has imposed some duty "upon them for the breach of which a right of action accrues to "any person injured by it."

He also said [5]: "In the series of cases ending with *Cowley* v. "*Newmarket Local Board*,[6] in which it has been held that an "action would not lie for non-repair of a highway, the duty to "repair was unquestionable, and it was equally clear that those "guilty of a breach of this duty rendered themselves liable to "penal proceedings by indictment or otherwise; the only question "in controversy was whether an action could be maintained. The "ground upon which it was held that it could not—even where "the duty of keeping the roads in repair had been in express terms "imposed by statute on a corporate body—was, that it had long "been settled that though a duty to repair rested on the inhabi"tants, subjecting them to indictment in case of its breach, they "could not be sued, and that there was nothing to show that the "legislature in transferring the duty to a corporate body had "intended to change the nature or extent of their liability."

Not to multiply citations unduly we will only add on this part of the case the following passages from the judgment of this court delivered by Finlay L.J. in *Swain* v. *Southern Railway Co.*,[7] where it was sought to extend the exemption in respect of mere non-feasance to the road on and approaches to a bridge for which the defendant railway company was responsible. Finlay L.J. said [8]: "We may refer, as Humphreys J. in the court below

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[2] (1788) 2 T.R. 667.
[3] [1895] A.C. 433, 435.
[4] Ibid. 435.
[5] Ibid. 443.
[6] [1892] A.C. 345; 8 T.L.R. 788.
[7] [1939] 2 K.B. 560; 55 T.L.R. 805; [1939] 2 All E.R. 794.
[8] Ibid. 573.

"referred, to *Municipality of Pictou* v. *Geldert*[9] where the law "is thus summarised by Lord Hobhouse delivering the opinion of "the Board[10]: 'The latest English case is that of *Cowley* v. "'*Newmarket Local Board*,[11] decided in the House of Lords. "'It must be now taken as settled law that a transfer to a public "'corporation of the obligation to repair does not of itself render "'such corporation liable to action in respect of mere non-"'feasance. In order to establish such liability it must be shown "'that the legislature has used language indicating an intention "'that this liability shall be imposed.'"

Then Finlay L.J. said[12]: "It is, in our opinion, plain that "the principle applicable originally to the inhabitants and appli-"cable now to any public authority which may stand in the shoes "of the inhabitants, has no application to a case such as the "present, where a company, carrying on its business for profit, "as one of the terms upon which it is given power to make its "line, comes under an obligation with reference to bridges and "the approaches thereto."

Later on,[13] Finlay L.J. made this reference to the judgment of Palles C.B. in the Court of King's Bench in Ireland in *Dublin United Tramways Co.* v. *Fitzgerald*[14]: "In that judgment, after "quoting the principle stated in Brooke's Abridgment, and after "referring to the principle established by *Russell* v. *Men of* "*Devon*[15] and *Cowley* v. *Newmarket Local Board*,[16] he said "this—we quote from the Appendix to the House of Lords Book—"'This principle, however, has never been applied to a trading "'corporation such as the present, and the principle upon which "'its extension has hitherto proceeded prevents it from being "'ever so applied. That principle rests upon the fact that in the "'matters complained of the exempted corporation represents "'the citizens and that for the discharge of the duties entrusted "'to them they are responsible to those whom they represent, "'and that if they fail to use their powers, well, they can be "'displaced at the next election. Bodies of this description in "'principle answer the description of the "populus" mentioned "'by Brooke. This principle can have no application to the "'present case in which the defendants are a private trading "'company.'"

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[9] [1893] A.C. 524.
[10] Ibid. 527.
[11] [1892] A.C. 345.
[12] [1939] 2 K.B. 560, 575.
[13] Ibid.
[14] [1903] A.C. 99.
[15] 2 T.R. 667.
[16] [1892] A.C. 345.

After discussing and rejecting the argument for the defendants based on dedication, Barry J. went on to state what we take to be his essential ratio decidendi in these terms: "Here, "the county council made the road, and they themselves created "the source of danger of which complaint is made. It is not "suggested, of course, that this approach island was a nuisance. "The county council no doubt had power to erect islands, "bollards and other obstructions as had the county council in "*Fisher* v. *Ruislip-Northwood Urban District Council and* "*Middlesex County Council*.[17] This case, however, clearly "establishes that the local authority must itself use reasonable "care to give warning against obstructions however lawfully "those obstructions may have been erected provided their erec"tion was the act of the authority itself. I would also refer to "the other cases relating to bollards, and the like, which are "collected in Pratt and Mackenzie's Law of Highways, 19th ed., "at pages 121 and 122. The extent of the duty to warn varies, "of course, with circumstances, but, had the county council "remained the authority responsible for the 'maintenance, "'repair and improvement' of this road, they would, in my "view, in the year 1955 have been under a duty to give some "adequate warning in the hours of darkness of the danger which "they themselves had created by the construction of this pro"truding kerb. Having regard to the statutory provisions to "which I have referred, a 'dedication to the public'—if such "an act had any legal significance—would not, in my view, have "absolved them from this duty. Therefore, had the county "council still been the highway authority responsible for the "maintenance of this road, I do not think they would have had "any answer to the present claim. I have, of course, to consider "whether this duty has been transferred to the present "defendants."

After quoting the terms of section 32 of the Local Government Act, 1929, the judge proceeded as follows: "Under this "section, as I read it, the function of maintaining the road is "transferred to the defendants after the machinery provided for "in section 32 of the Act of 1929 has been put into operation. If "I am right in my view, that as part of the exercise of this "function the county council were obliged to take reasonable "care to give warning against dangers which they had created, "a similar duty in relation to this approach island and round"about now, I think, vests in the defendants. The present

[17] [1945] K.B. 584; 62 T.L.R. 1; [1945] 2 All E.R. 458.

"position, as I see it, is quite different from that considered by "the Court of Appeal in *Nash* v. *Rochford Rural District Council.*[18] Here there is no question of the transfer of a 'liability' "in the legal sense of that term. What is in fact transferred "to the present defendants under section 32 of the Local "Government Act, 1929, is a 'function of maintenance,' and "that function includes, in my view, a duty of care in relation "to this roundabout and this approach island."

It will be seen that the judge reaches his conclusion by holding, first, that the county council would have been liable to the plaintiff if they had retained responsibility for Fleet Bridge Road down to the time of the accident, on the ground that they were under a duty to take reasonable care to give warning against dangers which they themselves had created in the shape of the approach island and roundabout; and, secondly, that a similar duty devolved on the defendants when they took over the road, with the result that they were under the like liability to the plaintiff for the accident as the county council would have been under if they had retained the road; and that he assigned this duty of care to the "function of maintenance" transferred to the defendants under section 32.

As to the hypothetical case against the county council, there is, as we have said, authority for the proposition that a highway authority constructing a road for the public use under statutory powers owes a duty to the public to take reasonable care to construct the road properly, so that it will be reasonably safe for the purposes for which it is intended to be used. See, for example, *McClelland* v. *Manchester Corporation*,[19] *per* Lush J.; *Thompson* v. *Bradford Corporation and Tinsley*,[20] *per* Bailhache J., and *Baldwins Ltd.* v. *Halifax Corporation*,[21] *per* Atkin J. Such cases are illustrations of the general principle enunciated in *Geddis* v. *Proprietors of the Bann Reservoir*,[22] where Lord Blackburn said: "For I take it without citing cases, that it is now "thoroughly well established that no action will lie for the doing "of that which the legislature has authorised, if it be done "without negligence, although it has occasioned damage to "anyone; but an action does lie for doing that which the legis"lature has authorised, if it be done negligently," and see also

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[18] [1917] 1 K.B. 384.

[19] [1912] 1 K.B. 118, 129, 130, 131; 28 T.L.R. 21.

[20] [1915] 3 K.B. 13, 21.

[21] (1916) 85 L.J.K.B. 1769, 1771, 1772.

[22] (1878) 3 App.Cas. 430, 455, 456.

per Lord Parker of Waddington in *Great Central Railway* v. *Hewlett.*[23]

One may add that the positive act of constructing a road, if it be done negligently, may be said to amount to misfeasance and not mere non-feasance.

If there had been negligence on the part of the county council in the construction of Fleet Bridge Road and some person had been injured by a danger created by that negligence, while the county council was still in charge of the road, it may very well be that the county council would have been liable for such injury on this principle. But we are not wholly satisfied that a case of negligence could have been made out against the county council on the facts of this case. The road was built in accordance with plans approved by the Minister, and there is no doubt that it was soundly constructed. The islands and roundabout and in particular the angle of splay of the Fleet Bridge Road approach island, which was designed to guide traffic into the roundabout headed in the right direction, conformed to the Ministry's requirements, and the elaborate system of traffic signs which we have described was installed. It would not have sufficed for the purposes of a charge of negligence against the county council merely to show that the system of traffic signs or the lighting arrangements might have been improved upon. Be that as it may, we fail to see how the defendants could be held liable on this principle, inasmuch as they were not the constructors of the road.

There is, no doubt, another well established principle (on which the judge chiefly founded himself) to the effect that if a highway authority place an obstruction on the highway they must take proper steps by lighting or otherwise to protect the public from the danger constituted by the obstruction. See the case cited by the judge of *Fisher* v. *Ruislip-Northwood U.D.C. and Middlesex County Council.*[24] Mr. Waller, for the plaintiff, forcibly maintained before us that although the approach island was a perfectly proper feature or adjunct of the highway it was one which would be dangerous at night in the absence of lighting or some other form of warning, and consequently that the county council on this principle brought itself under a duty to guard against danger constituted by the island they themselves had constructed, by means of lighting or some other form of warning. He said that this was a continuing obligation which passed to the defendants when they took over the road. He disclaimed reliance on the defendants' duty as lighting authority under section 161 of the Public Health Act, 1875 (on mere non-feasance in relation to which it is plain no claim could be founded), but said there was a special duty, arising out of the presence of the island, to light it or to provide some other warning of its presence. Mr. Quass, for the defendants, sought to meet this submission by contending that the island was not an obstruction but part and parcel of the highway itself. We doubt if this distinction is sound. It appears to us that the real answer to Mr. Waller's submission is that failure to light or give some other form of warning of an obstruction on the highway by a highway authority who themselves created the obstruction is taken out of the category of mere non-feasance and brought within the category of misfeasance by their positive act of creating the obstruction giving rise to the need for lighting or other means of warning. But no positive act in relation to the approach island was done by the defendants. They merely kept the island as they found it when they took over the road. The theory that the defendants inherited from the county council the duty to light or provide some other form of warning of the presence of the approach island appears to us (with respect to the judge) to be untenable in view of *Nash* v. *Rochford Rural District Council.*[25]

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[23] [1916] 2 A.C. 511, 519; 32 T.L.R. 707.

[24] [1945] K.B. 584.

If, therefore, the defendants are to be held liable it can only be by virtue of some express words in the Act under which the road became vested in them.

There is, however, nothing in section 32 of the Act of 1929 to impose on an urban district council taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance. On the contrary, the concluding words of subsection (1) "that Council shall have the same functions as if "they were as respects that road the highway authority and the "road were an ordinary road vested in them" appear to us to indicate that in such a case the general principle of immunity in respect of mere non-feasance applies.

It does not appear to us that the improvement of the lighting of the roundabout, or the provision of better means of warning by traffic signs or otherwise of the situation and shape of the Fleet Bridge Road approach island, can, as the judge thought, be classed as maintenance. Even if measures of that kind could be so classed, that would be no ground for holding that the

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[25] [1917] 1 K.B. 384.

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ordinary immunity in respect of mere non-feasance in regard to maintenance was excluded. Such measures being, to our minds, clearly works of improvement as distinct from maintenance, one might say that the ordinary immunity must a fortiori apply to the defendants' omission to take them.

For these reasons we are of opinion that this action should have been held to fail in limine and would accordingly allow this appeal.

Discussion of the issue of contributory negligence is thus rendered unnecessary, but it must not be assumed that we accept the judge's finding on this aspect of the case.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors: *Cohen, Jackson & Scott, Stockton-on-Tees; Archer, Parkin & Townsend, Stockton-on-Tees for Mace & Jones, Liverpool.*

J. A. G.

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Jan. 15, 16;
Feb. 9.

Morris and Sellers L.JJ., Wynn-Parry J.

SOCIETY OF MEDICAL OFFICERS OF HEALTH *v.* HOPE (VALUATION OFFICER).

[LVC/1200/1957.]

Estoppel—Per rem judicatam—Rates and rating—Local valuation court—Decision in 1951 *that society be entered on current valuation list as exempt from rates under Scientific Societies Act,* 1843*—Same question arising in* 1956*—Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48*—Scientific Societies Act,* 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

Rates and Rating—Science or fine art—Exemption—Whether decision of local valuation court on requisite entry in one valuation list res judicata in relation to new valuation list—Whether local valuation court a court of competent jurisdiction—Whether dispute before local valuation court a lis inter partes—Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *s.* 48*—Scientific Societies Act,* 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

Section 48 (4) of the Local Government Act, 1948,[1] provides that, on appeal to a local valuation court, the court "shall give such "directions with respect to the manner in which the hereditament in "question is to be treated in the valuation list as appear to them "to be necessary. . . ."

In 1951 a society made a proposal to delete from the current valuation list a hereditament occupied by it on the ground that it was exempt from payment of rates under section 1 of the Scientific Societies Act, 1843.[2] The valuation officer objected. On appeal to the local valuation court for the area, the court decided that the hereditament was exempt under the Act of 1843, and directed that the list be amended to accord with that decision.

On April 1, 1956, a new valuation list came into force by virtue of statutory directions, and the society's hereditament was entered

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[1] Local Government Act, 1948, s. 34: "(1) Subject to the provisions "of subsection (3) of this section, a "new valuation list shall be made for "every rating area so as to come into "force— . . . (b) inside London, on "the sixth day of April, 1952, and "the periods for which the valuation "lists in force at the date of the "passing of this Act are to remain in "force shall be extended accordingly. . . . (2) Thereafter new "valuation lists shall, subject to the "provisions of subsection (3) of this "section, be made for all rating "areas, whether within or outside "London, so as to come into force on "the first day of April in the following years, that is to say, the year "1957 and each fifth subsequent "year."

S. 48: ". . . (2) The procedure of "local valuation courts shall, subject "to such regulations, if any, as may "be made in that behalf by the "Minister, be such as the court in "question may determine, and every "such court—(a) shall, unless the "court otherwise order, on the application of any party to the appeal "and upon being satisfied that the "interests of either party would be "prejudicially affected, sit in public; "(b) may take evidence on oath and "shall have power for that purpose to "administer oaths. (3) On the hearing of an appeal to a local valuation "court—(a) the appellant; and (b) the "valuation officer, when he is not the "appellant; and (c) the owner or "occupier of the hereditament to "which the appeal relates, when he "is not the appellant; and (d) the "rating authority for the area in "which the hereditament in question "is situated, when that authority is "not the appellant; and (e) in the "case of an appeal against an objection, the objector, where he is not "one of the persons aforesaid, shall "be entitled to appear and be heard "as parties to the appeal and to "examine any witness before the "court and to call witnesses. (4) "After hearing the persons mentioned in the last preceding subsection, or such of them as desire to "be heard, the local valuation court "shall give such directions with "respect to the manner in which the "hereditament in question is to be "treated in the valuation list as "appear to them to be necessary to "give effect to the contention of the "appellant if and so far as that contention appears to the court to be "well founded, and the valuation "officer shall incorporate in the list "as settled, or, as the case may be, "cause to be made in the list, such "alterations as are necessary to give "effect to those directions. . . ."

[2] Scientific Societies Act, 1843, s. 1: ". . . no person or persons "shall be assessed or rated, or liable "to be assessed or rated, or liable to "pay, to any county, borough, parochial, or other local rates or cesses, "in respect of any land, houses, or "buildings, or parts of houses or "buildings, belonging to any society "instituted for purposes of science, "literature, or the fine arts exclusively, either as tenant or as owner,

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on that list with gross and rateable values. The society again made a proposal that it be exempt under the Act of 1843. The valuation officer objected. On appeal to the local valuation court for the same area, the court stated that they had in 1951 decided that the society was exempt, and in the absence of evidence adduced by the valuation officer of any variation in the society's constitution and activities since 1951, the court decided that the hereditament be exempt from rates under the Act of 1843.

On the valuation officer's appeal to the Lands Tribunal, the society entered a plea of res judicata, and the tribunal heard the appeal on that preliminary point, but rejected the plea of res judicata. On appeal by the society:—

Held, (1) (a) that section 48 of the Local Government Act, 1948, showed that a local valuation court was not merely an assessing authority but was a court of competent jurdisdiction to decide between the parties whether the society was entitled to exemption under the Act of 1843, and (b) that such a dispute was a lis inter partes; but

(2) (Sellers L.J. dissenting), that the doctrine of res judicata was inapplicable since the issue arising on the new valuation list of 1956 was a new issue which had to be resolved by a fresh investigation to ascertain whether the society was still within the Act of 1843. The only question which the court in 1951 had jurisdiction to decide was whether an entry should be made in the then valuation list in accordance with the society's proposal; and the force of that decision became spent and exhausted when that list was replaced by a new valuation list prepared in accordance with statutory direction in 1956. The decision of 1951 that the society was within the Act of 1843, though necessary to the decision as to the entry to be made in 1951, could not be conclusive as to any future entries to be made on any future valuation list.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155 distinguished.

Dicta of Lord Chelmsford in *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* (1866) L.R. 1 Sc. & Div. 17, 22–23, applied.

Per Sellers L.J., dissenting. The only issue—the only res—which arose on the 1956 valuation list was whether or not the society was exempt as a scientific society within the Act of 1843. That issue had already been tried between the same parties in 1951, in the court provided to hear such a dispute, and the matter was res judicata between the parties involved in that dispute unless evidence were adduced to show that the circumstances had changed.

"and occupied by it for the transaction of its business, and for "carrying into effect its purposes, "provided that such society shall be "supported wholly or in part by "annual voluntary contributions, and "shall not, and by its laws may not, "make any dividend, gift, division, "or bonus in money unto or between "any of its members, and provided "also that such society shall obtain "the certificate of the barrister-at-"law or lord-advocate, as hereinafter "mentioned."

APPEAL on case stated by the Lands Tribunal on a preliminary point of law.

The facts as stated in the decision of the Lands Tribunal (which formed part of the case stated at a later date) were as follows: On July 27, 1951, the Society of Medical Officers of Health, which occupied a hereditament described as offices, 3rd Floor Rooms, 483–486, Tavistock House, South Wing Extension, Tavistock Square, W.C.1, made a proposal under the provisions of the Local Government Act, 1948,[1] " to delete the hereditament " from the valuation list " on the ground that it was " exempt " from payment of rates under the Scientific Societies Act, " 1843."[2] Objection was made by the then valuation officer and the appeal was duly heard; and on October 24, 1951, a local valuation court for North-East London decided that the hereditament was " exempt from rating under the Scientific Societies Act, " 1843 " and gave directions for the amendment of the valuation list in accordance with that decision. No appeal against that decision was lodged by the valuation officer.

Under section 34 of the Local Government Act, 1948, as amended by the New Valuation Lists (Postponement) Act, 1952, and Orders made thereunder a new valuation list was made, to come into force on April 1, 1956. In the new list so made, the society's hereditament was entered with a gross value of £300 and rateable value £247.

On September 25, 1956, a proposal was made by the society for the alteration of the list by " the exclusion of the hereditament from the valuation list " on the grounds of " exemption " from payment of rates under the Scientific Societies Act, 1843." Objection was duly made by the valuation officer and on June 13, 1957, the matter came before the local valuation court for North-East London which, after hearing the parties, adjourned the hearing, deciding that " the court is satisfied that the question of " exemption of the society on the basis of its memorandum of " association and facts existing in 1951 has already been decided " between these parties and accordingly we are not prepared to " hear the valuation officer's objection unless he can bring " evidence to show some variation in the society's constitution " or activities since 1951."

On June 14, 1957, the solicitor for the valuation officer wrote to the clerk to the local valuation court a letter, which, so far as relevant, was in the following terms: " . . . The valuation officer's

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[1] See note on p. 463.

[2] See note on p. 463.

"case is that the Society of Medical Officers of Health is not "entitled to exemption under the provisions of the Scientific "Societies Act, 1843, in view of its constitution and its activities. "The valuation officer does not contend that any alteration has "been made in the constitution of the society since the earlier "decision of the local valuation court which was given on "October 24, 1951, and he does not suggest that the society now "carries on activities which it did not then carry on. The valuation officer relies on the present constitution of the society and "its present activities and he is not in a position to say whether "the present activities are in any way different from those to "which the court was referred in 1951; whether or not they are "different is, it is submitted, entirely irrelevant.

"The hearing was adjourned to enable the valuation officer "to give evidence of any changes or differences in the society's "activities, but the valuation officer does not wish to take advantage of this. Accordingly in view of the statement made by "the chairman at the close of the proceedings on June 13, all "that will remain for the court to do will be, it seems, to issue a "direction that the hereditament occupied by the society should "be treated as 'exempt.' In these circumstances the court "may not consider it necessary to arrange a further formal "hearing for the purposes of issuing its formal direction and might "prefer to dispense with any further hearing. You will no doubt "let me know the court's wishes in this respect in due course.

"It will, of course, be appreciated that the valuation officer "is in no way withdrawing his notices of objection to the society's "proposals and that it is his present intention to take the case to "the Lands Tribunal."

On June 24, 1957, the local valuation court gave their decision as follows: "Following the views of the court expressed at the "hearing on June 13, 1957, and as a result of a letter received "from the solicitors' office of the Inland Revenue dated June 14, "1957, the court hereby decide and direct that the offices, third "floor rooms, 483–486, Tavistock House, South Wing Extension, "Tavistock Square, be exempt from rating under the provisions "of section 1 of the Scientific Societies Act, 1843."

Notice of appeal to the Lands Tribunal was given by the valuation officer on July 11, 1957, on the following grounds: that the Society of Medical Officers of Health was not entitled to exemption from rates in respect of the hereditament under the provisions of section 1 of the Scientific Societies Act, 1843. In the reply of the society to the statement of case lodged by the valuation officer in pursuance of rule 11 of the Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), the society set out as a point of law on which they intended to rely at the hearing that: " The " appellant " [valuation officer] " cannot now be heard to say " that the respondent society is not entitled in respect of the said " hereditament to exemption from rating under the provisions of " section 1 of the Scientific Societies Act, 1843, by reason of the " following matters: (*a*) on July 27, 1951, the respondent society " made a proposal for the exclusion of the said hereditament from " payment of rates under the Act of 1843, to which proposal the " appellant gave notice of objection. (*b*) On October 24, 1951, " the local valuation court decided and directed that the hereditament should be exempt from rating under the Act of 1843."

At the hearing it was agreed between counsel for the contending parties and by the chairman of the tribunal (Mr. Erskine Simes Q.C.) that the point of law raised should be dealt with as a preliminary point of law.

Before the Lands Tribunal the general principle of res judicata was formulated in the following terms: " Where a question has " been decided by a court of competent jurisdiction in a lis inter " partes, those parties are estopped from reopening this decision " in any subsequent litigation between the same parties as to the " same question."

For the valuation officer it was contended, first, that proceedings in a local valuation court were not a lis inter partes and that they were analogous to proceedings before income tax commissioners. Secondly it was contended that the proceedings in relation to the 1956 proposal did not relate to the same question as those on the 1951 proposal, since the latter dealt with the appropriate entry to be made in the list then in operation, while the former dealt with the entry to be made in the new list which had been made and came into operation only on April 1, 1956. The contention was reserved that as under section 20 (1) of the Rating and Valuation Act, 1925, for the purpose of every rate, the valuation list as in force at the time when the rate was made was to be conclusive evidence of the several hereditaments included in the list, the proceedings were only effective for the period for which the rate was made. As an alternative submission it was contended that the local valuation court which heard the appeal in 1951 was not a court of competent jurisdiction within the rule because it had no jurisdiction to determine the question raised in 1956, namely, how the hereditament should be entered in the valuation list in force in 1956, the court in 1951 being concerned only with the way in which the hereditament should be dealt with in the list then in force.

For the society it was contended that the position of the income tax commissioners and the local valuation court were quite different; that the former had themselves to assess the income of the party for a particular year, whereas the local valuation court had under section 48 of the Local Government Act, 1948, to give "such directions with respect to the manner in which the "hereditament in question is to be treated in the valuation list "as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to "the court to be well founded" and on the hearing certain persons, including the valuation officer, were entitled to appear and to be heard as parties to the appeal. It was admitted for the society that a question of value could not be res judicata since it did not depend on status but on the circumstances in a particular case at a particular time. But it was contended that a decision on a question of status, depending on the construction of a particular document, was entirely different and could not be re-litigated; that whether the society on the construction of its memorandum of association was entitled to exemption under the Act of 1843 was a question of status; and that the fact that a new list had come into force was irrelevant.

The Lands Tribunal rejected the contention for the valuation officer that there was no lis inter partes in proceedings before the valuation court or that there was any analogy between such a court and the income tax commissioners, on the ground that that was quite inconsistent with the express provisions of section 48 of the Local Government Act, 1948. The local valuation court were not an assessing authority, "merely in the position of "valuers whose proceedings are regulated by statute to enable "them to make an estimate" (*per* Greer L.J. in *Inland Revenue Commissioners* v. *Sneath* [3]) but were by section 48 limited to giving effect to the contention of an appellant if and in so far as that contention appeared to them to be well founded after hearing the parties to the appeal, one of whom was the valuation officer.

But for *Hoystead* v. *Commissioner of Taxation* [4] the tribunal would have felt no doubt that the principle of res judicata could not apply to proceedings in respect of a different valuation list than that in respect of which a decision had been given, for each valuation list was a new list to be in force for a period specified by statute and all proposals and decisions consequent thereon were restricted to the entries appearing in the list for the time being in force. It seemed, therefore, to the tribunal that in 1951 the local valuation court had no jurisdiction to determine what entry should be made in the valuation list which came into force on April 1, 1956, in relation to the appeal hereditament. The tribunal found difficulty in accepting the suggestion for the society that there was a difference between value and status, for unless there had been some change which would affect the value of a hereditament ascertained in accordance with the statutory directions it would seem that a plea of res judicata could be as effective on a question of value as on a question of what had been described as status, since in both cases what had to be done was to construe certain facts in the light of a statutory provision.

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[3] [1932] 2 K.B. 362, 385.

[4] [1926] A.C. 155.

The tribunal, however, distinguished *Hoystead's* case [4] on the ground that the statute in question in that case was one which prescribed the method in which an assessment was to be made and it was the method which was called in question again in the subsequent case, whereas in the present case the question was whether the society should be entered in the list which came into force in 1956 with gross and rateable values or as "exempt," and no decision as to how it should be so entered in that list had ever been made. The point at issue in the present case was not dissimilar to that raised in *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* [5] and the dictum of Lord Chelmsford [6]: "It is sufficient to say that the proceeding in the "present case being for a different rate from that upon which "the former judgment proceeded, the cause of action is different "and the plea of res judicata is consequently inapplicable." seemed to the tribunal to apply to a case where there was a different valuation list. The Lands Tribunal was accordingly not prepared to dismiss the valuation officer's appeal on the plea of res judicata.

The question on which the decision of the court was desired was whether on the findings of fact in the case stated the tribunal came to a correct decision in law in rejecting the society's contention.

The society appealed.

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[4] [1926] A.C. 155.

[5] (1866) L.R. 1 Sc. & Div. 17.

[6] Ibid. 22–23.

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D. Tolstoy for the society. First, the question in 1951 was the same question as that in 1956, namely, whether the society was within the Act of 1843. That is a question of status and is res judicata. It is conceded that a decision as to value or assessment or estimate cannot by its very nature create a res judicata. But where the decision is as to a legal right or status or the construction of a document, that which enures is res judicata until there is shown a change of circumstances. The dicta of Lord Chelmsford on res judicata in *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor*[6] were obiter only, for, as Lord Cranworth L.C. pointed out,[7] the first decision could not by its nature be res judicata as it turned on a different point and was expressed to be without prejudice to future liability. *Smith* v. *Assessor for Argyllshire*[8] and *Lamont* v. *Dumfriesshire Assessor*[9] are distinguishable, since both were concerned with an estimate of value; and in so far as the dicta of the Privy Council in *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*[10] on res judicata in relation to a valuation are inconsistent with the decision in *Hoystead* v. *Commissioner of Taxation*[11] the court is asked to follow *Hoystead's* case[11] as more relevant to the present issue. [*New Brunswick Railway Co.* v. *British and French Trust Corporation*[12] and *Inland Revenue Commissioners* v. *Sneath*[13] were also referred to.]

In the present case there was a decision, before any question of assessment arose, that the society could not be assessed because it was within the Act of 1843. The hereditament should be included in the new valuation list as "exempt" without more.

[Morris L.J. If the same point arose in another case which then went to the House of Lords and there was a different result, do you say that this society would still be entitled to hold its judgment as res judicata?]

Yes; that was decided in *In re Waring, Westminster Bank* v. *Burton-Butler*,[14] where in 1942 it was held that on the construction of a will certain things followed. Subsequently the House of Lords in *Berkeley* v. *Berkeley*[15] held that that construction was wrong, and the parties in the 1942 case went back to the Chancery Division, the contention being that as there had been a change of circumstances, namely, a decision of the House of Lords, the matter should be relitigated. But Jenkins J.[16] held that as between the parties the decision of 1942 was res judicata.

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[6] L.R. 1 Sc. & Div. 17, 22–23.

[7] Ibid. 21.

[8] (1885) 12 Rettie 905.

[9] (1900) 2 Fraser 610.

[10] [1926] A.C. 94, 100.

[11] [1926] A.C. 155.

[12] [1939] A.C. 1; [1938] 4 All E.R. 747.

[13] [1932] 2 K.B. 362.

[14] [1948] Ch. 221; 64 T.L.R. 147; [1948] 1 All E.R. 257.

[15] [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

[SELLERS L.J. It does not matter whether the first decision was right or wrong The right course was to appeal at the time; but if the decision of the lower court is allowed to run, then, as a decision between the parties, it cannot be adjudicated upon again.]

Secondly, as the Lands Tribunal held, the local valuation court is a court of competent jurisdiction with authority to decide the question whether the society is within the Act of 1843; and this dispute is a lis inter partes. A court of competent jurisdiction is a tribunal with judicial authority to decide the matter between the parties not merely incidentally or collaterally but as a direct or fundamental point in the litigation. In the light of the provisions of sections 44 and 48 of the Local Government Act, 1948, it is difficult for the valuation officer to contend that this local valuation court is not a court of competent jurisdiction, since it is constituted by Parliament to decide certain issues between certain parties, and is invested with power to decide on the appellant's contention, which in this case is whether or not the society is within the Act of 1843. It is clearly a lis inter partes, for the court cannot give effect to a contention that section 1 of the Act of 1843 applies without coming to a determination on that point. *Wakefield Corporation* v. *Cooke*,[17] in which the House of Lords held that justices were entitled to decide whether a street was a highway, is applicable; and *Reg.* v. *Hutchings* [18] has no application to the position here. Nor is the position of a local valuation court in any way analogous to that of income tax commissioners, who are assessing authorities only. Here the lis comes into being when under the direction of Parliament the matter goes to the local valuation court.

H. J. Phillimore Q.C. and *Patrick Browne* for the valuation officer. First, the distinction sought to be drawn between value and status is invalid. The res in 1951 as in 1956 was: what entry should be made in the existing valuation list in regard to the society? The question in 1956 is thus not the same question as that in 1951; the local valuation court in 1951 was not competent to determine an entry in a subsequent list. It is true

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[16] [1948] Ch. 221.

[17] [1904] A.C. 31; 20 T.L.R. 115.

[18] (1881) 6 Q.B.D. 300.

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that in 1951 the court decided that this hereditament was exempt from rating under the Act of 1843, but that was collateral to what they were really deciding, namely, the proper entry in the list at the time of the society's proposal. The decision of a local valuation court on one list is a different res from a decision of the same court on another list, and between them there can never be res judicata. If it were held that the court in 1951 had authority to pronounce that this society is a society within the Act of 1843 for all time, such a decision would be contrary to *Reg.* v. *Hutchings*,[18] which is analogous, in that there it was held that the justices had authority only to decide whether expenses were recoverable, and that, if they went further and pronounced a judgment in rem, they would have exceeded their jurisdiction. All that the court in 1951 had jurisdiction to decide was that this society was a scientific society for the purposes of the 1951 valuation list. There is a necessity for a new inquiry every five years, and each time the position as at the date of the proposal must be investigated. The dicta of Lord Chelmsford in *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* [19] were not obiter but directly on the point of estoppel, which was in issue in that case, and though it is a Scottish decision it is on legislation similar to English legislation on the same subject and should be followed. *Hoystead* v. *Commissioner of Taxation*,[20] as a decision on an Australian tax matter, would not, in so far as res judicata was there held to apply to a tax matter, be followed in revenue matters in the courts applying the law of this country; and as between that case [20] and *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill* [21]—a rating decision of great persuasive authority—the latter should be preferred. See also *Patuck* v. *Lloyd*, *per* Lord Greene M.R.;[22] that the subject-matter is a different year's tax and a different year's assessment and is not the same. This point does not appear to have been taken in *Hoystead's* case.[23] [*North Eastern Railway Co.* v. *Dalton Overseers* [24] was also referred to.]

No rating case has been cited and none is known in which it has been held that the decision of a local valuation court, or of its predecessor, an assessment committee, has been held to be res judicata. The appeal is not purely technical, for great practical difficulties would arise if the decision of 1951 were

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[18] 6 Q.B.D. 300.

[19] L.R. 1 Sc. & Div. 17, 22–23.

[20] [1926] A.C. 155.

[21] [1926] A.C. 94.

[22] (1944) 26 T.C. 284, 292.

[23] [1926] A.C. 155.

[24] [1898] 2 Q.B. 66; [1900] A.C. 345 (H.L.).

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treated as res judicata. First, it is often difficult for a valuation officer to show a change of circumstances; and secondly, and more serious, it would become difficult to give effect to the decision of an appellate court altering the law. This is a branch of the law in which decisions of the court made from time to time alter the whole practice of valuation and assessment, as when the House of Lords in *Westminster Corporation* v. *Southern Railway Co.; Railway Assessment Authority and W. H. Smith & Son Ltd.*[25] overruled the decision in *Smith & Sons* v. *Lambeth Assessment Committee*,[26] which had been acted on for 50 years. Similar situations arose in respect of rating of sewers and brewers: see *Robinson Bros. (Brewers) Ltd.* v. *Durham County Assessment Committee.*[27] If res judicata applied, a number of substantial undertakings would be able to say and go on saying for ever: We cannot be rated because we have decisions in our favour.

[SELLERS L.J. I cannot think the objection is very formidable. The rating authorities have to apply a decision universally; but if a person has a decided case in his favour he gets the benefit of it. Surely the evil is greater if people have to come every time there is a new rating list and establish that they are a scientific society. There would be no end to litigation.]

This sort of provision is usually worked reasonably on both sides. If the valuation officer is indeed estopped as a party, the only practical solution would be to induce someone else who can be "an aggrieved person" within section 40 to make a proposal that the society shall not be exempt.

[SELLERS L.J. Would not it be illegal if a valuation officer who had been defeated persuaded someone else to make a proposal? Certainly he could not finance the action, for that would be champerty.]

Secondly, the local valuation court is not a court of competent jurisdiction, and this is not a lis inter partes. The court is administrative machinery for the determination of the proper entry in the list, and the proper liability, if any, of the taxpayer. But it is conceded that this point, in view of the provisions of the Local Government Act, 1948, is not capable of great elaboration. It is desired only to keep it open.

Patrick Browne following. The only situation with which one is concerned in a rating matter is the situation at the date of the proposal: *Barratt* v. *Gravesend Assessment Committee*.[28] From the earliest rating Act, the Poor Relief Act of 1601, where rating was described as "taxation," appeal was always against the rate for a particular year: see Ryde on Rating, 4th ed. (1920), p. 655, showing that a rate is in its nature transitory and not a permanent thing giving rise to an estoppel. Valuation lists are mere machinery and the fundamental matter is the rate; every rate is a separate question and can be challenged every year.

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[25] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.

[26] (1882) 10 Q.B.D. 327.

[27] [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79.

[Sellers L.J. Surely if a ratepayer came every year he could be stopped as a vexatious litigant?]

In practice the courts follow their own previous decisions, but technically the ratepayer would not be bound. The "list" referred to in sections 40 and 48 (3) of the Act of 1948 is the list for the time being in force at the date when the proposal is made.

Tolstoy, in reply, referred to *Tarr* v. *Cory Brothers Ltd.*,[29] *Boulter* v. *Kent Justices*[30] and *Inland Revenue Commissioners* v. *Brooks*.[31]

Cur. adv. vult.

Feb. 9. The following judgments were read.

Morris L.J. In the year 1951 the Society of Medical Officers of Health were in occupation of a hereditament at Tavistock House, Tavistock Square, in London. That hereditament was placed on the then existing valuation list. The society claimed to be exempt from the payment of rates. Exemption was claimed on the basis of the provisions of section 1 of the Scientific Societies Act, 1843. [His Lordship read section 1 so far as relevant, and continued:] The society would therefore be exempt from being rated if (a) it was a society instituted for purposes of science, literature or the fine arts exclusively; (b) it occupied the hereditament for the transaction of its business and for carrying into effect its purposes; (c) it was supported wholly or in part by annual voluntary contributions; (d) it did not and could not make any dividend, gift, division or bonus in money to members, and provided that a certain certificate was obtained.

The society proceeded to take the step which was open to it under the procedure laid down by the Local Government Act, 1948. Section 40 (1) of the Act provides as follows: "Any person

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[28] [1941] 2 K.B. 107; 57 T.L.R. 590; [1941] 2 All E.R. 308.

[29] [1917] 2 K.B. 774.

[30] [1897] A.C. 556.

[31] [1915] A.C. 478.

" who is aggrieved—(*a*) by the inclusion of any hereditament in " the list; or (*b*) by any value ascribed in the list to a hereditament or by any other statement made or omitted to be made in " the list with respect to a hereditament; or (*c*) in the case of a " building or portion of a building occupied in parts, by the " valuation in the list of that building or portion of a building as " a single hereditament, may at any time make a proposal for the " alteration of the list so far as it relates to that hereditament." Subsections (2) and (3) are as follows: " (2) The valuation officer " may at any time make a proposal for any alteration of a valuation list. (3) Any such proposal as is mentioned in the previous " provisions of this section is in this Part of this Act referred to " as ' a proposal '."

Section 41 deals with the proceedings on proposals. Subsection (1) is as follows: " Every proposal must—(*a*) be made in " writing and, except where it is made by the valuation officer, " be served on the valuation officer; (*b*) specify the grounds on " which the proposed alteration is supported; (*c*) comply " with any requirements of any regulations made by the Minister " with respect to the form of proposals and otherwise with " respect to the making thereof." Subsection (4) provides: " Where the proposal is made otherwise than by the valuation " officer, the valuation officer may, within twenty-one days from " the date on which the proposal is served on him, serve on the " maker of the proposal notice in writing of objection to the " proposal." Then by subsection (6): " Where notice of objection is made and is not unconditionally withdrawn—(*a*) the person making the proposal may, by notice of appeal served within " the time and on the persons hereinafter mentioned, appeal " against the objection to a local valuation court; and (*b*) no " alteration shall be made in the list in pursuance of the proposal " except where notice of appeal is given as aforesaid and then " only either—(i) in pursuance of the directions of a court or " arbitrator given under the subsequent provisions of this Part " of this Act; or (ii) by agreement between all the persons entitled " to be heard on the appeal."

By later legislation, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, certain new subsections were substituted [by Schedule I, Part II] for the original ones, and the present provisions of paragraphs (*b*) and (*c*) of subsection (6) are as follows: " if the proposal was made otherwise than by the " valuation officer, he may, at any time within the period of five " months beginning with the relevant date, give notice in writing "to the person who made the proposal that he objects to the "proposal, and that the said person, if he does not withdraw "the proposal within fourteen days, will be treated as intending "to appeal against the valuation officer's objection to the pro-"posal; (c) not less than fourteen nor more than twenty-eight "days after the valuation officer has given a notice under the "last preceding paragraph, he shall, unless the proposal has then "been withdrawn, transmit a copy of the proposal to the clerk "to the appropriate local valuation panel, together with a copy "of the notice under the last preceding paragraph, and of any "notice of objection to the proposal which has been served under "subsection (3) of this section and has not been unconditionally "withdrawn."

The appeal referred to is to a local valuation court. Section 44 (1) in its present form provides as follows: "Local valuation "courts constituted as hereinafter provided shall be convened as "often as may be necessary for the purpose of hearing and deter-"mining appeals under the preceding provisions of this Part of "this Act against draft valuation lists and against objections to "proposals for the alteration of valuation lists." Section 48 deals with the sittings, procedure and powers of local valuation courts. Subsections (2), (3) and (4) are, in their present form, as follows: [His Lordship read the subsections, and continued:]

The society availed itself of the right to make a proposal. The proposal was "to delete the hereditament from the valuation "list" on the ground that it was "exempt from payment of rates "under the Scientific Societies Act, 1843." The valuation officer objected to the proposal. The resultant appeal, which was the appeal of the society against the objection of the valuation officer, came before the local valuation court for North-East London on October 24, 1951. Their decision was that the hereditament was "exempt from rating under the Scientific Societies Act, 1843." They gave directions that the valuation list should be amended to accord with their decision. The valuation officer could have appealed against that decision to the Lands Tribunal (see the Lands Tribunal Act, 1949), but no appeal was lodged.

It was provided by section 34 (1) and (2) of the Local Government Act, 1948, as follows: "(1) Subject to the provisions of "subsection (3) of this section, a new valuation list shall be made "for every rating area so as to come into force . . . (b) inside "London, on the sixth day of April, nineteen hundred and fifty-"two, and the periods for which the valuation lists in force at the "date of the passing of this Act are to remain in force shall be "extended accordingly. . . . (2) Thereafter new valuation lists "shall, subject to the provisions of subsection (3) of this section, "be made for all rating areas, whether within or outside London, "so as to come into force on the first day of April in the following "years, that is to say, the year nineteen hundred and fifty-"seven and each fifth subsequent year."

By virtue of a later Act (the New Valuation Lists (Postponement) Act, 1952), and of Orders made under that Act, the dates laid down by the Act of 1948 were altered. But a new valuation list had to be made which was to come into force on April 1, 1956. A new list was made, and in it was entered the hereditament of the society together with figures of gross value and rateable value of £300 and £247 respectively.

The society claimed that it could still qualify for the exemption given by the Scientific Societies Act, 1843. It is to be observed that a society might qualify for exemption under circumstances existing at one date and might not qualify under circumstances existing at a different date. Accordingly, the society made a proposal on September 25, 1956. That was a proposal for the alteration of the list "by the exclusion of the "hereditament from the valuation list" on the grounds of "exemption from payment of rates under the Scientific Societies "Act, 1843." Strictly speaking, the society could not claim the "exclusion of the hereditament" from the list but could only claim to have it marked as exempt (see rule 22 of the Valuation Lists Rules, 1955 [S.I. 1955, No. 1680]).

The valuation officer made objection to the proposal of the society, and as a result the matter came before the local valuation court on June 13, 1957. It was the appeal of the society against the valuation officer's objection to its proposal. It is important to see what was the question which was before the court. It was, in effect, whether the society was entitled in respect of the new valuation list to have an entry made that it was exempt from rates. That raised the question whether, in reference to the proposal made by the society in 1956, the facts and circumstances were such that the provisions of section 1 of the Act of 1843 would give exemption.

The society as appellant had the right to begin. But apparently no evidence was given, and the course that was followed was that the court wished the valuation officer to state whether he alleged that the society's constitution or activities were different from what they were in 1951. The court, after hearing the parties, adjourned the hearing, deciding that "the court is "satisfied that the question of exemption of the society on the "basis of its memorandum of association and facts existing in "1951 has already been decided between these parties and, "accordingly, we are not prepared to hear the valuation officer's "objection unless he can bring evidence to show some variation "in the society's constitution or activities since 1951." The solicitor for the valuation officer made his attitude quite clear in a letter written on June 14. It was that the valuation officer did not wish to give evidence to show changes or differences in the society's constitution or activities since 1951. His contention was that in view of the then existing constitution and activities of the society it was not entitled to exemption. But, in view of the statement of the chairman of the court that, unless the valuation officer brought evidence of a variation since 1951, the court were "not prepared to hear the valuation officer's objection," there seemed no purpose in the further attendance of the valuation officer. The relevant parts of the letter are important and read as follows: [His Lordship read the letter set out in the case (supra) and continued:] It does not appear that at that stage the society could make any plea of res judicata. The society had gone to the local valuation court to appeal against the objection of the valuation officer to its proposal to have an entry made in the newly made valuation list to the effect that it was exempt from rates. The society was doubtless in a position to give evidence on the relevant matters, and its case was that it qualified for the exemption given by the Act of 1843. The matter was, in a sense, taken out of its hands by the court.

In the result, the local valuation court gave their decision on June 24, 1957. It was in the following terms: "Following the "views of the court expressed at the hearing on June 13, 1957, "and as a result of a letter received from the solicitor's office of "the Inland Revenue dated June 14, 1957, the court hereby "decide and direct that the offices, 3rd floor rooms, 483–486, "Tavistock House, South Wing Extension, Tavistock Square, be "exempted from rating under the provisions of section 1 of the "Scientific Societies Act, 1843." That decision must have been given on the assumption (though not on the proof) that the occupation of the society at the time of their proposal in 1956 was similar to the occupation in 1951, and that other existing facts were similar to those which existed in 1951, and on the basis that the constitution (whether the same as before or not) showed that the society was instituted for purposes of science, literature or the fine arts exclusively.

The valuation officer gave notice of appeal on July 11, 1957. Appeal lay to the Lands Tribunal. It does not seem to me that the right of the valuation officer to appeal can be questioned. Pursuant to the Rules of the Lands Tribunal, 1956 [S.I. 1956, No. 1734], the valuation officer as appellant lodged his case, and the society lodged its reply. In the reply it was stated that the society would rely on a point of law which they formulated as follows: "The appellant cannot now be heard to say that the "respondent society is not entitled in respect of the said heredita- "ment to exemption from rating under the provisions of section 1 "of the Scientific Societies Act, 1843, by reason of the following "matters:—(*a*) On July 27, 1951, the respondent society made a "proposal for the exclusion of the said hereditament from pay- "ment of rates under the said Act of 1843, to which proposal the "appellant gave notice of objection. (*b*) On October 24, 1951, "the local valuation court decided and directed that the said "hereditament should be exempted from rating under the said "Act of 1843." In effect, the society were seeking to preclude the valuation officer from appealing against the decision which the society had secured in their favour.

When the case reached the Lands Tribunal it was agreed by both parties that the tribunal should deal with this contention of the society as a preliminary point. The Lands Tribunal in a careful decision gave its reasons for declining to dismiss the appeal on the plea of res judicata. The Lands Tribunal stated a case for the decision of the Court of Appeal, the question stated being whether on the findings of fact recorded in the decision the Lands Tribunal came to a correct decision in law in rejecting the contention of the society as recorded above.

When the society were before the local valuation court in 1957 they were appellants who were asking for an order in their favour: they had taken the proper initiative, following the procedure laid down in the statutory code, to obtain an entry on a new valuation list in a form to which they submitted that they were entitled. It would not have availed them merely to produce the decision of 1951. The local valuation court in 1951 could not decide, and did not purport to decide, what entry should be made on some future valuation list not then in existence. The court in 1957 had to be satisfied as to the facts existing at the time of the new valuation list, and to consider the position at the date of the society's proposal. The circumstance that the court had decided what the facts were in 1951 did not establish what they would be in 1956. It is, of course, clear that in 1957 the facts could be very speedily and easily ascertained if someone was prepared to say that they were the same as or similar to those which existed in 1951 when the court had a previous appeal before it. But by whatever method the facts are ascertained in 1957, the court, in 1957, after having ascertained the facts, was giving its decision on the question as to what entry should be made in the new valuation list. What was decided in 1951 was as to what entry should or should not be made in the valuation list then existing. A decision then made on that question cannot preclude the court from giving whatever it considers to be the correct decision on a later question which later arises, namely, what entry should be made in a later list on the basis of the facts and circumstances later existing. If by the date of the later hearing the superior courts have given guidance on points of law, it would be wrong not to follow such guidance.

The underlying principle supporting a plea of res judicata is that it is desirable that litigation should end, and that it is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided. It has, however, always been clear that the plea will only avail if it appears that there is an attempt to reopen the very matter that has been decided. (Compare *In re Koenigsberg, Public Trustee* v. *Koenigsberg*.[1])

In *Inland Revenue Commissioners* v. *Sneath*,[2] Lord Hanworth M.R. said [3]: "There must be a lis inter partes in which the "point relied upon for establishing the estoppel was not merely "incidentally, or collaterally, discussed and litigated, but was "fundamental to the conclusion reached by the court. The court "must be one of competent jurisdiction that has seisin of the "case for the purpose of reaching a final decision inter partes, "though it may be a private tribunal such as an arbitrator, "whose forum is a domestic one constituted by the parties them-"selves." Lord Hanworth referred to the judgment of Lord Selborne L.C. in *Reg.* v. *Hutchings*,[4] who said: "The principles "of the law of estoppel by a judgment, inter partes, to which "alone I think it necessary to refer, may be taken from De Grey "C.J.'s opinion in the *Duchess of Kingston's* case,[5] and from that "of Knight Bruce V.-C. in *Barrs* v. *Jackson*.[6] The decision in "the latter case was reversed, but on a ground not at all touching

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[1] [1949] Ch. 348; [1949] 1 All E.R. 804.

[2] [1932] 2 K.B. 362.

[3] Ibid. 380.

[4] (1881) 6 Q.B.D. 300, 304.

[5] (1776) 2 Sm.L.C. (7th ed.) 761.

[6] (1842) 2 Sm.L.C. (7th ed.) 807.

"the statement of principles contained in it. 'The judgment' "(said De Grey C.J.) 'of a court of concurrent' (or of exclusive) "'jurisdiction, *directly upon the point*, is conclusive upon the "'same matter between the same parties coming incidentally in "'question in another court for a different purpose. But neither "'the judgment of a concurrent or exclusive jurisdiction is "'evidence' (that is, as I understand the meaning of the Chief "Justice, conclusive evidence) 'of any matter which came "'collaterally in question, though within their jurisdiction; *nor* "'*of any matter incidentally cognisable*, nor of any matter to be "'inferred by argument from the judgment.' Knight Bruce "V.-C. said: 'It is, I think, to be collected that the rule, against "'re-agitating matter adjudicated, is subject generally to this "'restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, "'however it may proceed on them as established, and however "'binding and conclusive the decision may be as to its "'immediate and direct object, those facts are not all necessarily "'established conclusively between the parties, and that either "'may again litigate them for any other purpose as to which they "'may come in question; provided *the immediate subject of the* "'*decision* be not attempted to be withdrawn from its operation, "'*so as to defeat its direct object*.'"

On behalf of the society it was not contended that a decision of a local valuation court or of the Lands Tribunal on a question as to the value of a hereditament could be regarded as binding for the future. But it was submitted that in the present case there had been a decision on a question of status, and that the local valuation court had in 1951 decided that the society had a status which gave it exemption from rates, and that that decision was binding for the future unless in the future the facts were not comparable with those previously existing. I cannot accept this submission. The local valuation court in 1951 did not and could not decide any other question than that which was before it. That question was whether an entry should be made in the valuation list in the manner set out in the proposal of the society. The local valuation court never purported to give a decision which could operate in relation to the year 1956. But it is urged that the decision given in 1951 must have involved the conclusion, as a matter of law, that the society was "instituted for purposes of "science, literature or the fine arts exclusively." Though there is no judgment of the local valuation court in 1951 which can be read so as to see how this aspect of the matter was dealt with, it is true to say that the court in 1951 ought not to have decided as they did unless they did conclude that the society was instituted for purposes of science, literature or the fine arts exclusively. But, in my judgment, no estoppel can arise even in a limited form for the reason that in 1951 the local valuation court had no jurisdiction save to deal with the then existing valuation list. Their decision on any incidental issue of fact or law, even though necessary in order to decide as to the valuation list which was before them, could not, in my judgment, be conclusive in reference to any future entries to be made on any future valuation list. A new list came into existence because there was a statutory obligation to make it. The force and effect of any decision relating to the list that existed in 1951 became spent and exhausted when that list was replaced by the new valuation list.

Both parties agree that it is a general principle that where a question has been decided by a court of competent jurisdiction in a lis inter partes, those parties are estopped from reopening this decision in any subsequent litigation between the same parties as to the same question. In their careful addresses to the court counsel cited numerous authorities. I do not propose to refer to all of these for the reason that many of them merely showed the application of the principle to different sets of circumstances and different topics.

We were referred to various decisions in tax cases, including *Patuck* v. *Lloyd*,[7] where Lord Greene M.R. said [8]: "There is no "such thing as res judicata in respect of the decisions of income "tax commissioners. They may or may not follow their previous "decision; but they are not bound to because the subject-matter "is a different year's tax and a different year's assessment and is "not the same as the subject-matter of the previous ruling."

It was submitted on behalf of the valuation officer that a proceeding before a local valuation court is not a lis inter partes, but is more in the nature of necessary administrative machinery for determining what entries should be made in a valuation list. But, in agreement with the view of the Lands Tribunal, I am not prepared to accept this submission. The provisions of section 48 of the Local Government Act, 1948, to which I have referred, show that a local valuation court is not an assessing authority. The court, after hearing such parties as are entitled to appear and be heard and after hearing evidence, must give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as are necessary in order to give effect to such contentions of an appellant as they decide to be well founded. But though the proceedings in 1957 can be regarded as being subsequent litigation between parties who previously litigated in 1951, the question in issue in 1957 was not, in my judgment, and for the reasons which I have given, the same question as that which was in issue in 1951.

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[7] (1944) 26 T.C. 284.

[8] Ibid. 292.

In *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor*[9] an action was brought in 1861 by the Inspector of the Poor and three owners or occupiers of property in North Leith against the Leith Harbour and Docks Commissioners to have it declared that they were liable to be assessed for the relief of the poor in respect of the lands, harbours, docks and property held by them, and that in estimating the yearly value all harbour dues and miscellaneous dues collected by them should be included and taken into account. One defence of the commissioners was that of res judicata; they said that the very question raised in the case had been already decided in a previous suit between the same parties. Further, they said that the property sought to be charged was held by them solely for the benefit of the public, and that the revenues were appropriated to the maintenance of the harbour and the payment of the cost of construction of works. It appeared that some years previously a question had been raised as to the liability of the commissioners to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. The commissioners in then denying liability had then pleaded the same ground of immunity as they later pleaded in the 1861 case as above referred to. The matter was litigated up to the House of Lords, and the House of Lords in 1855 reversed a decision of the Court of Session adverse to the commissioners. But when the decision of the House of Lords of 1855 was examined in considering the later case in 1866 it was manifest that the decision in the earlier case had turned on a totally different point from that of the immunity as claimed by the commissioners. In the later case, which also went to the House of Lords, the plea of res judicata was on this ground held to be invalid by Lord Cranworth L.C. Lord Chelmsford, with whom Lord Kingsdown agreed, while holding that the decision of the House of Lords in 1855 had left open the question of immunity from assessment, gave an additional reason for the failure of the plea of res judicata. He said[10]: "It appears to "me that the argument for the appellants has not sufficiently "attended to the nature of a plea of res judicata. The maxim "of the civil law, 'res judicata pro veritate accipitur,' applied "only when the identical question, which had been once judicially "decided, was again raised between the same parties—the rule "laid down in the Digest, lib. xliv. t. 2, s. 3, being 'exceptionem "'rei judicatae obstare, quoties eadem questio inter easdem "'personas revocatur.' This plea, therefore, is exactly analogous "to a plea in the English courts of 'judgment recovered'; in "which it is necessary, in order to make the judgment operate as "an estoppel, that it should be between the same parties and "upon the same subject-matter coming directly in question, "either in the same court, or in another court of co-ordinate "jurisdiction. Without considering whether the pursuers are "different or substantially the same in the present and in the "former action, or whether the circumstances under which the "question is now raised have been changed from what they were "before by the Act of the 23 & 24 Vict. c. 48, it is sufficient to "say that the proceeding in the present case being for a different "rate from that upon which the former judgment proceeded, the "cause of action is different, and the plea of res judicata is con"sequently inapplicable."

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[9] (1866) L.R. 1 Sc. & Div. 17.

In my judgment, the reasoning that a proceeding for one rate involves a different cause of action from that in a proceeding for a different rate applies to the situations where different valuation lists are in question.

A corresponding view was taken by the Privy Council in *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill.*[11] A New South Wales statute laid down a formula for ascertaining the unimproved capital value of a mine for rating purposes. In reference to the assessment of a mine in one year a question arose as to the correct construction of the statute. That question was decided by the High Court of Australia on appeal from the Supreme Court of New South Wales, to which court there had been an appeal from a judge of the District Court. In reference to the assessment of the mine for a later year, the Supreme Court of New South Wales considered that they were bound by the previous decision of the High Court of Australia as to the construction of the statute. On appeal to the Privy Council it was held that the question as to the correct method of ascertaining the unimproved value was not res judicata, and in the decision of the Board the matter was thus expressed[12]: "It "was also contended before this Board on behalf of the respon- "dents that having regard to the said decision of the High Court "of Australia the question raised by this appeal is res judicata "as between the appellants and the respondents, and the appel- "lants are estopped from contending that such decision of the "High Court of Australia is wrong. It has been pointed out that "no such question was raised or pleaded either before the District "Court or the Supreme Court in New South Wales, nor has there "been any adjudication or finding upon it. There is, however, "no substance in this contention. The decision of the High "Court related to a valuation and a liability to a tax in a previous "year, and no doubt as regards that year the decision could not "be disputed. The present case relates to a new question— "namely, the valuation for a different year and the liability for "that year. It is not eadem questio, and therefore the principle "of res judicata cannot apply."

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[10] L.R. 1 Sc. & Div. 17, 22–23.

[11] [1926] A.C. 94.

These authorities lend support to the view which I have expressed, and, for the reasons I have given, I consider that the Lands Tribunal were correct in rejecting the plea of res judicata.

Sellers L.J. On October 24, 1951, the local valuation court for the area, on the appropriate proceedings having been taken, held that the appellants, the Society of Medical Officers of Health, fulfilled all the necessary requirements of the Scientific Societies Act, 1843, and were exempt from liability to rates in respect of premises occupied by them as offices, being the third-floor rooms, 483–486, Tavistock House, Tavistock Square, W.C.1.

The application for exemption had been contested by the valuation officer (the present respondent) but the decision in favour of the society was not appealed from and the premises became and remained unrated.

Under section 34 of the Local Government Act, 1948, as amended by the New Valuation Lists (Postponement) Act, 1952, and Orders made thereunder, a new valuation list was made to come into force on April 1, 1956. The society's premises were entered in the new list with a gross value of £300 and rateable value of £247.

By the appropriate procedure the society again claimed exemption on the same ground as in 1951, namely, that they were exempted from being assessed or rated, or being liable to be assessed or rated, or being liable to pay any rates, by reason of the Scientific Societies Act, 1843. Notwithstanding the adjudication in October, 1951, the valuation officer objected to such exemption, and the matter came before the same court as before, the local valuation court for North-East London, on June 13, 1957.

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[12] [1926] A.C. 94, 100.

The society relied on the decision of 1951 that it was a scientific society entitled to exemption under the Act of 1843, and the court, no doubt itself cognisant of its previous decision, held that the issue had already been decided by them, and unless there was some variation in the society's constitution or activities since 1951, the court was not prepared to hear the valuation officer's objection.

Some question was raised before us as to the form rather than the substance, I think, of what happened at the local valuation court. The position was that the society were clearly relying on the decision which had been reached, after a contest between the parties, in 1951, and were saying that whether the society were a scientific society or not was res judicata or, more accurately, that the decision created an estoppel per rem judicatam. It was open to the valuation officer to say that that decision was not binding between the parties because in the intervening years the facts had changed and were so different that whether or not the society came under the Act of 1843 had to be judged afresh in the light of the different circumstances.

The local valuation court adjourned the hearing to enable the valuation officer to challenge the reliance on the decision of 1951 and to contend that the decision no longer applied to the altered circumstances; but he indicated his attitude in the letter of June 14, 1957, cited in full by the Lands Tribunal, and as a consequence on June 24, 1957, the local valuation court made an order exempting the society's premises from rating on the ground that the question of exemption of the society on the basis of its memorandum of association and facts existing in 1951 had already been decided between the parties. In the letter it was stated: "The valuation officer does not contend that any alteration has "been made in the constitution of the society since the earlier "decision of the local valuation court, which was given on "October 24, 1957, and he does not suggest that the society now "carries on activities which it did not then carry on." Whatever the next sentence in the letter may have intended to convey or achieve, it states in part that, even if the then activities of the society were the same as in 1951, it was entirely irrelevant.

If the valuation officer had wished he could no doubt have required the society to prove that the circumstances were the same—it seems a little pedantic to require, as was submitted, that they should be described as similar when one is dealing with a society's constitution and activities and the user of premises—before it could be said and held that the matter in issue was res judicata. That was not the course taken by the valuation officer. He was prepared to accept that the circumstances had not changed, that change or no change was irrelevant, and to argue that in rating matters in respect of entries in a new valuation list, or at least in respect of the entry of these premises, no issue decided on a previous occasion could be binding.

The valuation officer's position in this litigation is emphasised by the course which the dispute subsequently took. The parties agreed to the trial of a preliminary point of law by the Lands Tribunal on the ground that the valuation officer could not be heard to say that the society was not entitled in respect of the premises in question to exemption from rating under the provisions of section 1 of the Scientific Societies Act, 1843, because the local valuation court had in 1951 decided and directed that the society should be exempt thereunder.

This appeal, in my view, must be heard, and can only be heard, as a preliminary point on the basis that the facts and circumstances do not differ from those existing in 1951 in so far as the issue of the society's right to exemption from rateability under the Act of 1843 is concerned.

The question for our consideration is not whether the valuation officer or the local valuation court, if invoked, can consider afresh whether the society's premises should be included in the new valuation list as premises to be rated—of course they must—but whether or not in considering that question there can be litigated again the society's right to exemption under the Act of 1843 if all the relevant circumstances of its constitution and its user of the premises are unchanged. There is, as I see it, no question of the local valuation court having jurisdiction, or even purporting to exercise jurisdiction, to decide in 1951 what should or should not be included in a 1956 or any other valuation list except the then current list. It clearly could do no such thing. Entries in a new valuation list, and in this case the entries in the 1956 valuation list, have to be considered, if challenged, by the procedure provided. The submission of the society is that in their case an estoppel per rem judicatam arises because their claim for exemption can in no way be differentiated from the claim which they have already established.

The basis of an estoppel per rem judicatam is that it is in the public interest that there should be an end to litigation, and I do not favour the submission that a good general ruling to this effect should be held inapplicable because the decision relied on could in effect be reopened by someone who was not a party to the original proceedings. It is for the society in this case, desirous as it is of setting up res judicata as a bar to the claim against it that its premises are rateable, to bring itself within all the requirements to establish the plea, except in so far as they are admitted by the valuation officer. It has been accepted that the parties are the same in the litigation now raised as in the decision of 1951. There seem to be five other elements to be established: (1) that there was a judicial decision; (2) that the judicial decision was in fact pronounced; (3) that the tribunal pronouncing the decision had competent jurisdiction to do so; (4) that the decision was final; and (5) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised. I have adopted this convenient summary from Spencer Bower's book on Res Judicata [1924 ed., p. 9].

The decision of the Lands Tribunal deals with the contentions on behalf of the valuation officer before him, and those contentions were repeated with perhaps varying emphasis before us. The submissions were that there was and is no estoppel by record by reason of the judgment in personam of the local valuation court because the proceedings there did not create a lis inter partes; that the court was not a court of competent jurisdiction; that the proceedings in 1951 were in respect of the then valuation list and could not apply to proceedings in respect of the new and different valuation list which came into force on April 1, 1956; and that the court in 1951 had no jurisdiction to determine any question raised in 1956.

The society made their proposal in 1951 that they should be exempted from rateability under the Act of 1843 in accordance with the procedure for deciding such an issue if the valuation officer challenged the claim. The procedure is laid down in the Local Government Act, 1948, and in particular in sections 40, 41, 44 and 48. Section 44 provides for a local valuation court to be convened "for the purpose of hearing and determining appeals "under the preceding provisions of this Part of this Act against "objections to proposals for the alteration of valuation lists."

Then section 48 (2) and (4) made certain provisions, which I do not read, as my Lord has already read them. Section 49 gives a right of appeal, now to the Lands Tribunal, to any person who appeared before a local valuation court on the hearing of an appeal and is aggrieved by the decision of the court.

I agree with the Lands Tribunal that the local valuation court was a competent court, constituted by the Local Government Act, 1948, to deal with matters in dispute such as arose here and that there was a lis inter partes. The only ground on which the society claimed exemption was that it was a scientific society within the terms of the Act of 1843. It was a question which required a careful judicial inquiry. It received it and a decision thereon from the appropriate court whose decision was final, subject to any appeal—which in this case was not made.

The argument to the contrary was based on several authorities dealing with decisions of the income tax commissioners. As the Lands Tribunal pointed out, the local valuation court is not an assessing authority, and he, in my view, rightly rejected these submissions of the valuation officer. But he has held that the principle of res judicata could not be applied to proceedings in respect of a different valuation list than that in respect of which a decision had been given. Under present legislation the ratepayers are confronted with the prospect of a new valuation list every five years. If the view appealed against is right, it would seem that if it takes the greater part of five years (as well it might) for a ratepayer (or indeed for a valuation officer) to have the benefit of a decision in the House of Lords, then no sooner would this have been achieved than the whole question could be litigated again on the same material, steadily exhausting one quinquennial period after another.

I would reject the view that there can be no finality on any issue in rating unless authority restrains me. Instability and uncertainty seem to be as undesirable in rating as in any other sphere affecting future planning and financing of the affairs of a trade, an organisation or an individual.

A new valuation list provides the occasion for reviewing the entries of premises not only as to their values but as to exemptions and categories, such as industrial or freight transport hereditaments. On the face of it, a value fixed in one year has to be regarded in a different setting both actually and relatively five years later, or even one year later, and in fact there would seem little scope for a plea of res judicata in respect thereof. Authorities were quoted, which counsel for the society did not challenge, to the effect that values or estimates could not be relied on by a plea of res judicata. In the days when a person aggrieved had to challenge a rate in order to air his grievance, an objection sustained or rejected one year could not be said to be res judicata in respect of a newly assessed rate for a subsequent year. The rate had to be estimated afresh each year and was clearly attackable as a new estimate.

But the present issue seems to me not to be affected by a question of value or estimate. The society found itself placed on the new valuation list coming into force on April 1, 1956. Its only claim for exemption was that it was a scientific society within the Act of 1843. The only issue which arose was whether the society was or was not so exempt. In an issue already tried between the same parties, in the court provided to hear such a dispute, it had been held that the society was within the Act in its purposes and activities, and in the occupation and user of the premises, and was entitled thereby to exemption from rates. The matter is, therefore, as I see it, res judicata between the parties involved in that dispute unless circumstances have changed. This preliminary point arises on the basis that circumstances have not changed and, in my opinion, the question cannot be litigated further, even if the decision, if reviewed, might be held to be wrong.

Counsel for the valuation officer relied mainly on the following three cases: *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor*,[13] *Reg.* v. *Hutchings*,[14] and the Privy Council case of *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*.[15] In the *Leith Harbour* case[16] the relevant part of the headnote is as follows: "Res Judicata:—That "the court has decided against a poor-rate for one year, is no "reason why it should not decide in favour of a poor-rate for "another and a different year, in respect of the same property, "and in a suit between the same individuals. The doctrine of "res judicata does not apply to such a case," and the valuation officer relied in particular on the speech of Lord Chelmsford.[17] But the speech of Lord Cranworth L.C. on the point was as follows[18]: "There remains the single point of res judicata, which, "I think, will appear to your Lordships to be more plausible than "substantial. Some ten or eleven years ago the question was "raised as to the liability of the commissioners of this very

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[13] L.R. 1 Sc. & Div. 17.
[14] 6 Q.B.D. 300.
[15] [1926] A.C. 94.
[16] L.R. 1 Sc. & Div. 17.
[17] Ibid. 22–23.
[18] Ibid. 20–22.

"harbour to contribute to the rate for the year from Whit-"Sunday, 1846, to Whit-Sunday, 1847. They denied liability; "and pleaded, amongst other things, that 'The subjects were "'held by them solely and exclusively for the benefit of the "'public; and further, that the rates and revenues leviable being "'by law limited and appropriated to the maintenance and repair "'of the harbour, and the liquidation of the debt incurred in the "'construction of the works, they were not liable for the assess-"'ment.' That case, however, turned, as appears by Mr. "Macqueen's report of it, on a totally different point. And the "affirmance of a part of the decision below, so far as it was "affirmed, had reference not to the general question of rateability, "but solely to the payment to be made for a particular year. "Care, however, was taken by the House to guard itself from "expressing any opinion as to the general question of the rate-"ability of harbours and docks." The earlier case on which reliance had been placed is inserted in the report [19] and it reveals that both Lord Cranworth L.C. and Lord Brougham made it clear that the judgment of the House should be so drawn up as not to prejudice the parties with respect to any rate that might be imposed thereafter. I do not think that that case is helpful and certainly not conclusive in the present dispute, both because the earlier decision could not in its terms be relied on, and on the general ground that the appeal had been against the rate for a given year.

In *Reg.* v. *Hutchings* [20] this court held that the adjudication of justices that a street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local court from claiming the expenses they claimed on the second application. That statement from the headnote seems accurately to state the decision of Lord Selborne L.C., who presided and gave the only judgment of the court.

In the present case no question of the court's jurisdiction to try the issue in 1951, or as to whether its judgment was directly on the point or not has arisen, or could arise, and I fail to see that *Hutchings'* case,[20] strongly relied on by counsel for the valuation officer, has any application. In the prior court Lush J., on the basis that the decision was within the justices' jurisdiction,

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[19] L.R. 1 Sc. & Div. 17, 21n.

[20] 6 Q.B.D. 300.

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had held that the defendant was entitled to the benefit of the estoppel claimed by him. The effect of *Hutchings'* case [20] was dealt with in *Wakefield Corporation* v. *Cooke*,[21] and treated as a case where the justices clearly had no jurisdiction. The *Wakefield* case [21] itself turned on the conclusiveness of a judgment in rem. In *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill* [22] a question which had arisen as to the method of ascertaining the average annual value of a mine was held not res judicata by a decision of the High Court of Australia between the parties to the valuation for a previous year. Lord Carson, who delivered the judgment of the Judicial Committee, in dealing with the estoppel point said [23]: "It was also contended before "this Board on behalf of the respondents that having regard to "the said decision of the High Court of Australia the question "raised by this appeal is res judicata as between the appellants "and the respondents, and the appellants are estopped from "contending that such decision of the High Court of Australia is "wrong. It has been pointed out that no such question was "raised or pleaded either before the District Court or the Supreme "Court in New South Wales, nor has there been any adjudication "or finding upon it. There is, however, no substance in this "contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt "as regards that year the decision could not be disputed. The "present case relates to a new question, namely, the valuation "for a different year and the liability for that year. It is not "eadem questio, and therefore the principle of res judicata cannot "apply."

In the same volume of reports another Australian case, *Hoystead* v. *Commissioncr of Taxation*,[24] is reported. There, in a judgment delivered by Lord Shaw, the Judicial Committee held that the commissioner was estopped since, although in previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. Lord Wright cited those two Privy Council cases in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[25] and said that it was not necessary to decide between the decisions if they conflicted, or to reconcile them if they merely seemed to conflict. I think the facts here are different from and clearer than those in either of the Australian cases cited. The issue in the present case was not only fundamental; it was the only issue in the appeal to the local valuation court in 1951, and was in no way dependent on any admissions.

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[20] 6 Q.B.D. 300.

[21] [1904] A.C. 31; 20 T.L.R. 115.

[22] [1926] A.C. 94.

[23] Ibid. 100.

[24] [1926] A.C. 155.

[25] [1939] A.C. 1, 36–37; [1938] 4 All E.R. 747.

Hoystead's case[26] was concerned with taxation and not rating, but I would apply its reasoning to the present case, and would regard it as the most relevant of all the authorities cited to us, especially as taxation is a matter of annual assessment and therefore periodic as is rating.

The full court in Australia had held in respect of the financial year 1918–19 that the trustees of the will were entitled to make six deductions of £5,000 from the assessment of liability to taxation as the six beneficiaries were joint owners, within certain subsections of the Land Tax Assessment Act. Lord Shaw continued[27]: "Matters were allowed to rest upon this footing for "another year. And then, in the subsequent year, the whole "matter was reopened by the action of the commissioner of taxa"tion who, in respect of the same estate and the same parties, "reverted to the position that the taxable value should not be "six sums of £5,000 as decided in the former case, but one "sum of £5,000. To this it was answered, to put the matter "briefly, that the former decision was right upon its merits, but "that whether so or not, the respondent was estopped by the "judgment already pronounced. If this argument be sound there "is an end of the case; and it will be unnecessary to enter upon "the merits of the difference between the parties upon the con"struction of the statute. In the opinion of their Lordships the "contention of the appellants is sound, and the respondent is "estopped by judgment." Then Lord Shaw said[28]: "As to the "amount of deduction to be made under the Act, being either "six sums of £5,000 or one sum of £5,000, the former litigation "settled six; the judgment under appeal settled one. There is "accordingly between the same parties in regard to the same "property a definite prescription of deduction from assessable "values. The Board is of opinion that that prescription was as "conclusively settled in the former litigation as language could "settle it, it having been 'How many deductions of £5,000 the "'respondent should make?' and the judicial answer being 'six.' "Apart from the other arguments and the authorities to be "presently alluded to, the case appears thus to be concluded in

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[26] [1926] A.C. 155.
[27] Ibid. 163.
[28] Ibid. 165–166.

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"favour of the appellants. Very numerous authorities were "referred to. In the opinion of their Lordships it is settled, first, "that the admission of a fact fundamental to the decision arrived "at cannot be withdrawn and a fresh litigation started, with a "view of obtaining another judgment upon a different assump-"tion of fact; secondly, the same principle applies not only to an "erroneous admission of a fundamental fact, but to an erroneous "assumption as to the legal quality of that fact. Parties are not "permitted to begin fresh litigations because of new views they "may entertain of the law of the case, or new versions which "they present as to what should be a proper apprehension by "the court of the legal result either of the construction of the "documents or the weight of certain circumstances. If this "were permitted litigation would have no end, except when legal "ingenuity is exhausted. It is a principle of law that this cannot "be permitted, and there is abundant authority reiterating that "principle. Thirdly, the same principle—namely, that of setting "to rest rights of litigants, applies to the case where a point, "fundamental to the decision, taken or assumed by the plaintiff "and traversable by the defendant, has not been traversed. In "that case also a defendant is bound by the judgment, although "it may be true enough that subsequent light or ingenuity might "suggest some traverse which had not been taken. The same "principle of setting parties' rights to rest applies and estoppel "occurs." Then the noble Lord referred to some of the cases of outstanding authority, and went on[29]: "It is seen from this "citation of authority that if in any court of competent jurisdic-"tion a decision is reached, a party is estopped from questioning "it in a new legal proceeding."

Inland Revenue Commissioners v. *Sneath*,[30] to which reference was made in the argument, does not seem to be relevant, except for an interlocutory observation by Greer L.J., who said[31]: "I should feel difficulty if the special commissioners was "a court of competent jurisdiction in saying that there was not "here an estoppel." The decision was that the commissioners' determination was not on a lis inter partes of a competent court so as to create an estoppel per rem judicatam.

The valuation list giving rise to consideration of the issue was new, and the time for applying the decision was different. It seems to me that such sort of consideration would normally arise when the plea of estoppel per rem judicatam is raised. The question is whether the matter in issue is the same. I would hold it to be precisely the same, namely, whether or not the society is qualified as a scientific institution to exemption from rating under the Act of 1843. That is the res, the only issue on which the society can justify its exemption. If on the same facts the local valuation court were to find contrary to its 1951 decision, there would be two conflicting decisions of the same court in litigation between the same parties on the same subject-matter, the only difference being an interval of a few years.

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[29] [1926] A.C. 155, 170.
[30] [1932] 2 K.B. 362.
[31] Ibid. 372.

It is not even suggested that any decision of the courts had intervened which, if the question can be reviewed, would or might invalidate the first decision. But, even if there were such an authority, it would not defeat the plea of estoppel. In *In re Waring, Westminster Bank* v. *Burton-Butler*[32] Jenkins J. held that "the decision" (that is, the decision relied on as res judicata) "was a decision . . . that those annuities must be provided "for as annuities of twenty twenty-ninths of the full amount "thereof so long as tax continued at 10s. in the pound. It has "been overruled, or in other words has been held by a higher "tribunal to be wrong in law and not to be followed in other cases, "but it is nevertheless a subsisting order which is binding on the "parties to the proceedings in which it was made."

With deference to my Lords and to Mr. Erskine Simes Q.C., whose view they approve, I do not think that the distinction which they find between *Hoystead's* case[33] and the present holds. The question in the *Hoystead* case[33] was the assessment for tax in a given year. The tax commissioners were held estopped from adopting a different method for that year in a certain matter of allowance in arriving at their assessment from that which had been decided between the parties in the course of litigation two years earlier. In the present case the rating authorities have to prepare a list of those premises which are liable to rating for the given period. In so doing they are estopped from saying that the society is not a scientific society within the meaning of the Act of 1843 and entitled to the benefits which the Act gives them because that precise issue has been decided. The society claims no greater or other estoppel.

I would allow the appeal and would hold, in answer to the question asked, that the Lands Tribunal did not come to a correct decision in law in rejecting the contention of the society set out in paragraph 3 of the case.

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[32] [1948] 1 Ch. 221, 227; 64 T.L.R. 147; [1948] 1 All E.R. 257.

[33] [1926] A.C. 155.

WYNN-PARRY J. I am of opinion that, for the purposes of considering whether the doctrine of res judicata applies in this case, first, the local valuation court is a court of competent jurisdiction, and, secondly, that the contention between the parties as to whether or not the society is entitled to exemption from liability to be rated in respect of the hereditament in question under section 1 of the Scientific Societies Act, 1843, is a lis inter partes, as regards the society and the valuation officer.

Mr. Tolstoy contended that the decision of the local valuation court in 1951 on the construction of the memorandum of association of the society is, as he put it, a constant factor, and that, therefore, by reason of this decision of the local valuation court in 1951, the society, so far as concerns the construction of its memorandum of association must, when the new valuation list came to be considered in 1956, be held to be still within section 1 of the Scientific Societies Act, 1843.

I agree with Morris L.J. that this is not a sound contention, but, even if it were, it could not conclude the matter: there are other conditions set out in section 1 which must be fulfilled before the benefit of the section can be claimed. It must be shown (inter alia) that the premises are occupied by the society for the transaction of its business and for carrying into effect its purposes. The society may fulfil that condition at one given point of time but fail to do so at another. The question whether or not it does so at any given point of time is wholly a question of fact.

The effect of section 34 of the Local Government Act, 1948, as amended, is that a new valuation list must be prepared every five years by the valuation officer. It is clearly an essential part of his duty to consider the position as regards all premises within his area as they exist at the time of making his list. In 1951, having considered the circumstances as they then existed, he entered the society in the 1951 valuation list on the basis that they were liable to be rated. The local valuation court took the view that in the existing circumstances the society fulfilled all the conditions set out in section 1 of the Scientific Societies Act, 1843, and was, therefore, exempt, and the valuation list was accordingly amended. In 1956 a new list had to be prepared, and for that purpose the circumstances then obtaining had to be ascertained, because, as I have pointed out, the society might have ceased to fulfil one or more of the conditions set out in section 1.

It matters not to my mind what is the result of the investigation into the circumstances obtaining in 1956: it may be found that the society fulfils all the conditions in section 1, or it may be found that the society has ceased to fulfil one or more of the conditions in that section. The vital point is that the investigation has to be made. To my mind the inevitable result of the necessity to make the investigation is that the res which was brought into existence in 1951 becomes exhausted. If, as a result of the valuation officer inserting the society in the new list as liable to be rated, the society make a proposal for exemption, a new issue arises between the parties which has to be resolved. It matters not whether it is resolved by the local valuation court after evidence has been adduced by the valuation officer or whether it is resolved without any evidence being adduced by him. The important and, to my mind, the decisive point is that the new issue has to be resolved.

Now, if this reasoning be right, it must follow that a decision of any court on a particular list can only bind the parties at most during the currency of that list. The local valuation court proceeded on the basis that there was not shown to be any change of circumstances between 1951 and 1956. They therefore decided that the hereditament should be marked "exempt." In doing so, they must be taken not to have applied the doctrine of res judicata, but merely to have followed their own previous decision.

As regards the authorities, the only one which at first sight appears to support the society is *Hoystead* v. *Commissioner of Taxation*,[34] a decision of the Judicial Committee of the Privy Council. In my view that case is to be distinguished from the present case; and in order to point the difference I do not think that I can do better than quote from the decision of Mr. Erskine Simes in the Lands Tribunal: "The distinction between that "case and the one now under consideration seems to me to lie "in the fact that the statute then in question was one which "prescribed the method in which an assessment was to be made "and it was the method which was called in question again in the "subsequent case, whereas in the present case the question is "whether the respondent society should be entered in the list "which came into force in 1956 with gross and rateable values "or as exempt and no decision as to how it should be so entered "in the list has ever been decided." I also agree with what follows: "The point at issue in the present case is not dissimilar "to that raised in *Commissioners of the Leith Harbour and Dock* "v. *Inspector of the Poor*,[35] and the dictum of Lord Chelmsford: "'it is sufficient to say that the proceedings in the present case

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[34] [1926] A.C. 155.

[35] L.R. 1 Sc. & Div. 17, 23.

" 'being for a different rate from that upon which the former " 'judgment proceeded, the cause of action is different and the " 'plea of res judicata is consequently inapplicable' seems to me " to apply to a case where there is a different valuation list."

I therefore conclude that the doctrine of res judicata is inapplicable in this case, and that the decision of the Lands Tribunal was correct.

Appeal dismissed.
Matter to be remitted to the Lands Tribunal.
Leave to appeal to the House of Lords granted.

Solicitors: *Hillearys; Solicitor, Inland Revenue.*

M. M. H.

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Feb. 12, 13.
Diplock J.

LOUIS DREYFUS & CIE. *v.* PARNASO CIA. NAVIERA S.A.

[1958 L. No. 1988.]

Shipping—Charterparty—Cargo—Declaration of quantity—" Quantity " in owners' option to be declared by the master "—Declaration by master of approximate quantity—Incapacity of vessel to load amount declared—Whether declaration by master binding on owners—Owners responsible for " loss of or damage to or for delay in delivery " of goods "—Owners responsible for " no loss or damage or delay " arising from any other cause whatsoever "—Whether owners responsible for loss arising from failure of vessel to load contract quantity of goods.

Contract — Construction — Deletions — Standard form — Relevance in construing form of deleted words.

Contract—Construction—Ut res magis valeat quam pereat—Promise to give notice of capacity of ship—Notice giving approximate capacity —Whether binding subject to de minimis rule.

Ejusdem generis rule—Contract—Consecutive clauses—Similar subject-matter—Noscitur a sociis—Exceptions clauses in charterparty.

Election or Option—Effect of exercise—Charterparty—Notice of capacity of ship.

Commercial Court—Value of—Speed—Judgment four months after issue of writ.

Words and Phrases—" Loss or damage "—Gencon charterparty.

Ships' Names—Dominator.

A charterparty in the " Gencon " form, dated November 4, 1957, for a single voyage, provided by clause 1 that the *S.S. Dominator*

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was to proceed to a named port "and there load a full and complete "cargo of not more than 10,450 tons and not less than 8,550 tons "wheat in bulk, quantity in owners' option, to be declared by the "master in writing on commencement of loading . . ." Clause 2 of the charterparty, by the first paragraph, provided: "Owners are "to be responsible for loss of or damage to the goods or for delay "in delivery of the goods only in case the loss, damage or delay "has been caused by improper . . . stowage of the goods . . . or by "personal want of due diligence on the part of the owners or their "manager . . ." By the second paragraph of clause 2: "And the "owners are responsible for no loss or damage or delay arising "from any other cause whatsoever . . . " The third paragraph of the clause in the printed form, which had been deleted, related to damage to goods.

On arrival at the port the master of the vessel wrote to the charterers that "the approximative [*sic*] cargo to the holds will "be . . . Total 10,400 tons." The charterers brought that quantity of cargo to the port, but in fact the master had over-estimated the capacity of the vessel and she loaded 331 long tons short. As a result of the vessel's inability to load the whole of the cargo the charterers incurred expenses which they sought to recover from the shipowners. The shipowners, inter alia, relied on the second paragraph of clause 2 of the charterparty as exempting them from liability:—

Held, (1) that, on the true construction of clause 1 of the charterparty, once the shipowners had exercised their option through their nominated agent, the master, of declaring the quantity of cargo to be carried, the quantity so declared between the limits was to be deemed a full and complete cargo for the purposes of the charterparty; that the word "approximative" in the master's notice to the charterers, which purported to be given under the clause and therefore to be of an exact quantity, referred only to those limits of tolerance imported into such commercial contracts by the de minimis rule, so that the notice was a good declaration under the clause; and that, therefore, the quantity of cargo to be loaded under the contract was 10,400 tons.

Dictum of MacKinnon J. in *Chandris* v. *Louis Dreyfus & Co.* (1934) 50 Ll.L.Rep. 141, 145 considered.

(2) That since the words "no loss or damage or delay" in the second paragraph of clause 2 of the charterparty were in their context ambiguous, assistance in their construction might be obtained by looking at the deleted printed words of the third paragraph of the clause.

Where a standard form of words familiar to commercial men was contained in a printed form in general use it was unreal to suppose that, when the contracting parties struck out a provision dealing with a specific matter, but retained other provisions, they intended to effect any alteration other than the exclusion of the provision struck out and, prima facie, no such intention should be ascribed to them.

(3) That on its true construction the operation of the whole of clause 2 was limited to loss of or damage to or delay in the delivery of goods, and the second paragraph, therefore, did not

exempt the shipowners from liability for loss sustained by the charterers owing to the shipowners' failure to load the contract quantity of cargo. The charterers, accordingly, were entitled to recover from the shipowners.

ACTION.

By a printed charterparty in the form known as "Gencon" recommended by the Documentary Council of the Baltic and White Sea Conference, dated November 4, 1957, made between the plaintiffs, Louis Dreyfus & Cie., as charterers, and the defendants, Parnaso Cia. Naviera S.A., as owners of the *S.S. Dominator*, it was provided, by clause 1, that the vessel was to "proceed to La Pallice . . . and there load a full and com- "plete cargo of not more than 10,450 tons and not less than "8,550 tons wheat in bulk, quantity in owners' option, to be "declared by the master in writing on commencement of loading ". . . which the charterers bind themselves to ship, and being "so loaded the vessel shall proceed to Karachi . . . and there "deliver the cargo on being paid freight."

By clause 2 of the charterparty "Owners are to be responsible "for loss of or damage to the goods or for delay in delivery of "the goods only in case the loss, damage or delay has been "caused by the improper or negligent stowage of the goods . . . "or by personal want of due diligence on the part of the owners "or their manager to make the vessel in all respects seaworthy "and to secure that she is properly manned, equipped and sup- "plied or by the personal act or default of the owners or their "manager.

"And the owners are responsible for no loss or damage or "delay arising from any other cause whatsoever, even from the "neglect or default of the captain or crew or some other person ". . . for whose acts they would, but for this clause, be respon- "sible, or from unseaworthiness, of the vessel on loading or "commencement of the voyage or at any time whatsoever."

The third paragraph of clause 2 in the printed form provided: "Damage caused by contact with or leakage, smell or evaporation "from other goods or by the inflammable or explosive nature "or insufficient package of other goods not to be considered as "caused by improper or negligent stowage, even if in fact so "caused" but that paragraph had been deleted and the following words inserted in typescript "Owners to be responsible for "number of bags signed for in bills of lading."

Clause 16 provided that the charterers were "to supply a "sufficient quantity of cargo in bags for safe stowage as required "by the master, not exceeding 7½ per cent. of the entire cargo, "such quantity to be declared by the master in writing on commencement of loading."

The vessel arrived at La Pallice on November 23, 1957, when, on the request of the charterers' agents for an immediate declaration in accordance with the provisions of clause 1 of the charterparty, the master, after making calculations, wrote to the agents in the following terms:

"To the shippers, La Pallice.

"I . . . the Master of the steamer *Dominator*, I have to "notify you that I shall require 300 tons wheat in bags for "loading and the approximative [*sic*] cargo to the holds will be "as follows:—

"No. 1 hold 1,600 long tons.
" 2 hold 3,000 ditto.
" 3 hold 2,000 ditto.
" 4 hold 2,150 ditto.
" 5 hold 1,650 ditto.
"Total:—10,400 tons."

The master had inadvertently calculated the quantity of cargo which the vessel could load on the basis of summer marks instead of winter marks on which the vessel was sailing, so that she was unable to load the total 10,400 tons and in fact loaded 331 long tons short. The charterers had brought the whole of the cargo to La Pallice and as a result of the inability of the vessel to load the 331 long tons incurred expenses which were agreed at £155 8s. 2d.

The charterers withheld that amount from the freight and, alleging that, upon the declaration by the master, the shipowners became obliged to load and/or warranted that the vessel was capable of loading 10,400 tons, claimed a declaration, inter alia, (a) that by reason of the inability of the vessel safely to load the 331 long tons the shipowners were in breach of the charterparty and (b) that the damages suffered by reason of that breach amounted to £155 8s. 2d.

The shipowners denied that they were under any liability to the charterers and alleged that had the vessel been able to take 10,400 tons the 331 long tons would have been loaded and that she had in fact sailed from La Pallice with a full and complete cargo; they denied that the notification by the master to the charterers had the effect in law for which the charterers contended or any effect in law. Further or alternatively they relied upon clause 2 of the charterparty as exempting them from any liability to the charterers.

R. A. MacCrindle for the plaintiff charterers. The obligation imposed on the shipowners by clause 1 of the charterparty was to carry a full and complete cargo, which for the purposes of the charterparty was to be the quantity declared by the master. The master's declaration, therefore, in defining the quantity was of contractual effect. Had the clause not contained the words "quantity in owners' option," the effect of the margins "not "more than" and "not less than" would have been to define the limits of "a full and complete cargo" so that if less than the lower limit was carried the owners would have been in breach of contract, but also that there was no obligation to carry more than the higher limit, even though the ship was capable of doing so: see *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[1] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[2] The addition of "quantity in owners' option" has a narrowing effect, so that when the owners exercised the option and declared a quantity within the margins, that was the quantity which was to be notionally "a full and "complete cargo." It is appreciated that in *Chandris* v. *Louis Dreyfus & Co.*[3] MacKinnon J. said[4] that such a declaration by the master could not vary the contractual obligation, but that observation was obiter and the situation to which it was directed is not clear; it is submitted that it was directed to a declaration of a quantity outside the limits provided for by the charterparty. In any event, *Chandris* v. *Louis Dreyfus & Co.*[4] should be distinguished, for there the charterparty contained no express option and itself defined the quantity, within margins, to be loaded: that was irrespective of the master's declaration, and a declaration by the master, which, if effective, would otherwise have varied the charterparty, could not have any contractual effect. In this charterparty the limits are defined but the quantity is unknown until declared, so that, provided it is within the limits, the declaration defines the contractual quantity. The option here is analogous to an option to nominate a port or berth which, once exercised, is deemed to have been written into the charterparty. There was, therefore, a contractual obligation to load 10,400 tons, of which the shipowners are in breach.

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[1] (1897) 2 Com.Cas. 173.

[2] [1910] 1 K.B. 627; 26 T.L.R. 301.

[3] (1934) 50 Ll.L.Rep. 141.

[4] Ibid. 145.

Clause 2 of the charterparty does not exempt the shipowners from liability in respect of that breach of their obligation. The first paragraph of the clause is concerned with loss of or damage to or delay in delivery of "the goods." The third paragraph, which has been deleted, was also concerned with damage to goods, as, indeed, is the typed insertion, so that the only provision in the clause on which the shipowners can rely is that in the second paragraph: "And the owners are responsible for no loss "or damage or delay arising from any other cause whatsoever." But when a provision of that kind is sandwiched between two other provisions, also concerned with loss or damage, it must be construed to refer to the same type of loss or damage as the other two provisions, that is, loss or damage or delay to goods and not to financial loss of the kind in question here. That argument is fortified by the use of the conjunctive "And," and also by the fact that the expanding word "whatsoever" is not placed after the words "loss or damage or delay" but after "arising from "any other cause." The scheme of the whole clause is to deal with a certain kind of loss or damage or delay due to a personal act or default: if financial loss was intended to be included, the word "delay" is otiose, for delay is only a cause of action when it in fact causes financial loss. The specification of one type of financial loss leads to the conclusion that the clause was not intended to cover other types of financial loss. If there is any doubt as to the meaning of the clause it should be construed contra proferentem.

Clause 2 is an exceptions clause seeking to obviate the consequences of a breach of an obligation and is not concerned with the assumption of an obligation. Shipowners seeking to rely on it, therefore, must point both to the obligation and the breach. But the declaration by the master was not a breach of an obligation but a definition of it, so that the obligation did not come into existence until the master had made the declaration. Therefore, even if the clause would exempt the owners from liability in respect of a breach of an obligation brought about by neglect or default on the part of the master, it has no application to any loss or damage arising out of assumption of the obligation by means of the declaration. Moreover, the owners, since they were content to carry whatever quantity the master declared, became, on the making of the declaration, under a personal obligation to carry the amount declared. Their position is the same as if they had left it to a clerk to fill in the quantity of cargo in a charterparty and the clerk had negligently filled in too great an amount: in such a case they would be in breach of warranty if they were unable to tender a ship capable of carrying the amount. [Reference was also made to *S.S. Istros* v. *F. W. Dahlstroem & Co.*[5] and *The Roberta.*[6]] So, here, the owners warranted that the vessel was capable of carrying the quantity of cargo declared by the master, and the fact that she was not capable of carrying that quantity was not due to any subsequent happening to which the clause can attach.

The point is formally taken that, if it is right to say that the master in making the declaration represented that the vessel was capable of carrying that amount of cargo, that was a representation which was acted on by the charterers in bringing the full amount of cargo to the vessel, and, accordingly, the owners are estopped from denying its accuracy and cannot be heard to say that the master made a mistake and that the ship was incapable of carrying the whole amount declared. They have, therefore, no defence available to them in proceedings based, as these are, upon a failure to carry the declared quantity.

Michael Kerr for the defendant shipowners. The master's declaration had no legal effect upon the rights or duties of either party. The only distinction between clause 1 of this charterparty and the provision considered by MacKinnon J. in *Chandris* v. *Louis Dreyfus & Co.*[7] is that that provision did not contain the words "quantity in owners' option," but it is submitted that those words are a necessary implication from the words used: "The master to declare quantity." Reliance is therefore placed on the view of MacKinnon J.[8] that if the master declared a certain figure he would not be varying the terms of the charterparty or creating a new contractual liability for his owners. It is conceded that that observation was obiter, but it is incorrect to say that it was directed to a declaration of a quantity outside the limits stated in the charterparty. But on general principles it is submitted that that is the right view. The governing words of clause 1 are "a full and complete cargo." The owners' obligation was to load a full and complete cargo, the owners to decide what was a full and complete cargo, subject to the master giving an indication to the charterers of what it would be; the only qualification was that there was no obligation to ship more than the maximum stated and there was a warranty that the vessel was capable of carrying the minimum. [Reference was also made to *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[9] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[10]] The words "quantity in owners' option, to be declared by the master" neither add to nor detract from the obligation to carry "a full "and complete cargo," and it was not intended that it should be varied by the master's declaration or that the character of a warranty should attach to the declaration. Had the clause referred to "cargo" and not to "a full and complete cargo" the governing words might well have been "quantity in owners' "option": see the cases summarised in Scrutton on Charterparties, 16th ed. (1955), pp. 161, 162.

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[5] [1931] 1 K.B. 247.

[6] (1938) 60 Ll.L.Rep. 84.

[7] 50 Ll.L.Rep. 141.

[8] Ibid. 145.

The principle that an option, when exercised, is deemed to have been written into the contract has only been applied to those charterparties which give charterers the express right to order the ship to a port or berth named by them and in relation to that right. In that context it is treated as an election crystallising rights, but the exercise of an option in relation to cargo is in the nature of a selection and not an election: see *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*,[11] *per* Atkin L.J.[12] There is no reason why the master's declaration should be treated as a warranty; the only warranty given was that the vessel would be capable of carrying "not "less than 8,550 tons," but if the argument for the charterers on this point is right it would mean that the declaration was a warranty as to minimum. It would be straining the words of the charterparty to hold that a declaration of the wrong quantity could become such a warranty and give rise to a right to damages. At its highest it was a misrepresentation as to capacity which might give rise to rescission, not damages, but it is submitted that the only result of the declaration was that thereafter the owners were estopped from asking for a greater quantity of cargo.

If the obligation under clause 1 of the charterparty was not an obligation to load a full and complete cargo it was an obligation to load the quantity named by the owners through the master in exercise of their option. In that case the master's declaration was either of no effect or took effect as an option to load a full and complete cargo. The option could not be exercised by naming more than a full and complete cargo, and if by a miscalculation more was declared, that was a bad exercise of

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[9] 2 Com.Cas. 173.

[10] [1910] 1 K.B. 627.

[11] [1924] 2 K.B. 619; 40 T.L.R. 876.

[12] [1924] 2 K.B. 619, 637.

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the option. In any event, the declaration made by the master was of an "approximative" quantity. "Approximate" means "about" or "thereabouts," and it is submitted that the deficiency here, 3·14 per cent., is within its range: see, as to "about," *Morris* v. *Levison*,[13] where 3 per cent. above 1,100 tons was held to be "a fair amount of excess" and "about "the right quantity to fix on," *per* Brett J.[14] See also *The Resolven*,[15] where 5 per cent. was held to be a fair margin to allow as "thereabouts." The charterers could not have expected that the exact quantity declared would be loaded; some allowance must be made, and it is submitted that 3·14 per cent. is fair and reasonable.

If there was here any breach of the charterparty the shipowners are exempted from liability by clause 2. The loss or damage sustained by the charterers was not caused by any of the matters referred to in the first paragraph of the clause and therefore falls within "loss or damage . . . arising from any other "cause whatsoever" for which, in the second paragraph, the owners are not to be responsible. The use of the word "what-"soever" excludes an ejusdem generis construction of the paragraph, and the meaning of "loss or damage" there should not be cut down by reason of the position of the paragraph in the clause. Although there appears to be a divergence of authority on the matter (see Scrutton on Charterparties, 16th ed. (1955), p. 33), it is submitted that the court should not look at the deleted paragraph in construing the paragraphs which remain. "And" in the second paragraph means "but," and the paragraph draws a distinction between physical loss or damage, for which the owners are responsible, and other loss or damage for which they are to be under no liability.

The words "loss or damage" should not be cut down to mean physical loss or damage to goods unless it is so stated, and where they are not followed by qualifying words must bear their ordinary and natural meaning as including financial loss. If that is putting the matter too high, it is submitted that, unless expressly stated, the words do not connote actual physical loss or damage "to" goods but loss or damage "in connection with "or in relation to" goods: see the differing constructions placed upon the words where they appear in different contexts in the Hague Rules, in particular the views of Lord Morton of Henryton and Lord Tucker in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*,[16] and of Devlin J.[17] and Viscount Simonds and Lord Keith of Avonholm in *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*[18]; see also the view of Pearson J. in *Goulandris Brothers Ltd.* v. *B. Goldman & Sons Ltd.*[19] The loss incurred here by the charterers was loss in connection with or in relation to the goods which the vessel was unable to load and, on either view, is within the paragraph.

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[13] (1876) 1 C.P.D. 155.
[14] Ibid. 158.
[15] (1892) 9 T.L.R. 75.

[Diplock J. What does "delay" mean in the second paragraph?]

Delay there means delay in connection with or in relation to the goods, for example, delay in the presentation of the vessel. If that is wrong, and it means delay in delivery of the goods, that is what happened here, for non-delivery is the highest form of delay.

It is submitted that the argument for the charterers based on the contention that the shipowners' obligation did not arise until after the declaration by the master, and the argument that the shipowners are estopped from denying that the ship was capable of carrying the amount declared, are both fallacious.

[Diplock J. I need not trouble you on either of those points.]

MacCrindle in reply. Clause 1 of the charterparty calls for a qualified declaration of the quantity to be loaded, but no latitude is expressed. The master's declaration purported to be given under the clause, and it is therefore submitted that the word "approximative" must be treated as being no more than an invocation of the de minimis rule. There is no justification for implying any greater latitude in a case such as this than is implied in those cases where the quantity of cargo is stated in the charterparty. The principles to be applied are the same as those which apply in cases under the Sale of Goods Act, 1893: see, for example, *Shipton, Anderson & Co.* v. *Weil Brothers & Co.*,[20] where Lush J., applying the dictum of Bigham J. in *Harland & Wolff Ltd.* v. *Burstall & Co.*,[21] that in carrying out a commercial contract some slight elasticity was unavoidable but that delivery must be substantially of the quantity named, said[22]: "A right

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[16] [1957] A.C. 149, 169, 173; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957.

[17] [1957] 2 Q.B. 233, 253; [1957] 2 W.L.R. 509; [1957] 1 All E.R. 673 (sub nom. *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.*).

[18] [1959] A.C. 133; [1958] 2 W.L.R. 688, 698, 718; [1958] 1 All E.R. 725.

[19] [1958] 1 Q.B. 74, 105, 106; [1957] 3 W.L.R. 596; [1957] 3 All E.R. 100.

[20] (1912) 17 Com.Cas. 153.

[21] (1901) 6 Com.Cas. 113, 116.

[22] 17 Com.Cas. 153, 163, 164.

"to reject is founded on the hypothesis that the sellers were not "ready and willing to perform or had not performed their part "of the contract. The tender of a wrong quantity does evidence "an unreadiness and unwillingness, but that in my opinion must "mean an excess or deficiency in quantity which is capable of "influencing the mind of the buyer." Had the master miscalculated by half a ton, or even a ton, that would not have influenced the mind of a reasonable charterer, but it was not intended that a greater latitude should be granted than a reasonable charterer would allow, and he would not allow a deficiency of over 300 tons, such as there is here.

Decisions as to the meaning of the words "loss or damage" in the Hague Rules are not of assistance in construing clause 2 of this charterparty. It is submitted that the court may have regard to the deleted third paragraph and that the whole of the clause is concerned with damage to or loss of goods. Paragraph 2 is an exception from the exceptions from liability in paragraph 1, and in view of its position in the clause and the use of the word "And," a conclusion that it was intended to refer to a different type of loss or damage would be surprising. The word "delay" in paragraph 2 is a further indication that it does not refer to financial loss or damage.

[Counsel was not required to reply further.]

Diplock J. This is an action brought by the French charterers of a Panamanian ship for declarations relating to their rights in respect of an alleged breach of the charter by the shipowners. The writ was issued on October 27, 1958. Judgment is being delivered today, less than four months since the action was started. It is a matter for congratulation to the parties that the matter in dispute between them should come for its initial solution, at any rate, so very shortly after the proceedings started; and I may say, as I have said before, that it is to provide expeditious decisions on commercial matters of this kind that the commercial list was set up.

The matter arises in this way: On November 4, 1957, the plaintiffs and defendants entered into a charter in the "Gencon" form. The first clause which I must read—I fortunately need read but few of the clauses of this charter—is the first clause in the charter itself, where it was provided that the Panamanian vessel *Dominator* should proceed to La Pallice afloat "and there "load a full and complete cargo of not more than 10,450 tons "and not less than 8,550 tons wheat in bulk, quantity in owners' "option, to be declared by the master in writing on commencement of loading"—I omit an irrelevant clause in parenthesis—"which the charterers bind themselves to ship, and being so "loaded the vessel shall proceed to Karachi." The freight was on a tonnage basis.

The vessel proceeded to La Pallice, and on November 23 the master gave a notice purporting to be a declaration in writing made under clause 1 of the charter. That notice was in this form: "To the Shippers, La Pallice. I . . . the Master of the "steamer *Dominator*, I have to notify you that I shall require 300 "tons wheat in bags for loading and the approximative cargo to "the holds will be as follows: No. 1 hold 1,600 long tons, No. 2 "hold 3,000 long tons, No. 3 hold 2,000 long tons, No. 4 hold 2,150 "long tons, No. 5 hold 1,650 long tons; total 10,400 tons," and was signed by the master, Captain Roussos, who is a Greek by nationality, which may account for the slightly imperfect English in which the notice is cast.

The vessel started loading, but at the time she was sailing to her winter marks and she proved incapable of carrying the full amount of 10,400 tons, and in fact loaded 331 long tons short. The charterers had brought the cargo to La Pallice ready to load pursuant to the master's notice and as a result of the vessel's inability to load the 331 tons, expenses amounting to some £155 were incurred in sending that portion of the cargo elsewhere, which the charterers deducted from the freight. The question which I have to determine is whether they are entitled —whether by way of set-off or whether by way of claim for damages does not matter in the circumstances of this case—to recover from the shipowners for breach of contract the expenses incurred in that way. That question depends upon two points of construction: first, the true construction of the clause which I have already read and secondly, if I am in favour of the charterers on the construction of that clause, there arises the question of the construction of the "Gencon" owners' responsibility clause.

At first sight, it would seem plain that once the owners had exercised their option, through their nominated agent, the master, of declaring the quantity to be carried, the quantity of cargo which they were bound to load and the charterers bound to ship was the quantity so declared. Is there some mystique about charterparties which prevents the words from having this effect, which I think is a perfectly plain one? I doubt if it would have been argued that the words had any other meaning than the one

I have suggested were it not for a certain dictum of MacKinnon J. in *Chandris* v. *Louis Dreyfus & Co.*[1] Before I read that, it is desirable to note that that was an action for rectification of a charterparty in respect of which arbitration proceedings were already current, and the main point in the case was whether a provision in the charterparty containing an undertaking by the owners as to the capacity of the vessel should be rectified. The undertaking in the charterparty as signed was as follows: "That "the said steamer . . . shall proceed to one or two ports be-"tween Karachi and Calicut . . . and . . . load in customary "manner from the charterers . . . a full and complete cargo of "linseed and/or groundnut kernels in bags . . . which owners "undertake will be not more than 2,300 tons and not less than "2,000 tons English weight linseed and/or groundnut kernels in "bags." Since the vessel was capable of carrying a great deal more linseed than groundnut kernels, groundnut kernels being a bulkier cargo, the main issue between the parties was whether or not the warranty as to capacity related to linseed alone or whether it did, as expressed, also warrant a capacity for groundnut kernels. As a result of consideration of the evidence, MacKinnon J. came to the conclusion that the former was the real agreement between the parties and that the contract should be rectified accordingly. The actual form of the rectification he left to the parties. There was, however, a provision in the charterparty: "The master to declare quantity of cargo required on "readiness to load." The master had in fact declared 1,850 tons as the quantity required of groundnut kernels. The capacity of the vessel for groundnut kernels, it would appear from the report, was 1,730 tons. Again it would appear from the report, though not very clearly, that there was some alternative claim being prosecuted before the arbitrator based upon an obligation to carry the amount declared by the master—an amount, be it observed, which was greater than the carrying capacity for groundnut kernels which the judge had held that the owners had warranted. In relation to that, application was also made to MacKinnon J. to rectify the charter further by deleting the words "The "master to declare quantity of cargo required on readiness to "load." MacKinnon J., on the evidence, thought that the charter should not be rectified in this way, and he went on to say this[2]: "Mr. Catsell very candidly has said: 'I think this clause, "The "' "master to declare quantity of cargo required on readiness to

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[1] (1934) 50 Ll.L.Rep. 141, 145.

[2] Ibid. 145.

" ' " load " is part of the usual Bombay charter adapted.' That " being so, it must stand as part of this charter. I was going to say " that I express no opinion as to the effect of that. I may perhaps " state that it does not seem to me that it has really any con- " tractual effect at all; it is merely a sort of intimation for the " convenience of the parties; but I cannot think that, if the " master says a certain figure, he would be varying the terms " of the charter or creating a new contractual liability for his " owners. However, that is only my present impression; I have " not had it exhaustively argued, and it is not necessary for " that to happen." I do not think that that dictum, in somewhat obscure circumstances relating to a charterparty in different terms from that with which I have to deal, really assists me in deciding the meaning of the clause in this case.

No doubt, if the clause had read " there load a full and com- " plete cargo of not more than 10,450 tons and not less than 8,550 " tons wheat in bulk " and had stopped there, the obligations of the parties would have been that the owners warranted a minimum capacity of 8,550 tons and that the charterers were under an obligation to provide a full and complete cargo up to 10,450 tons if the vessel were capable of holding so much, but under no obligation to provide more. That well-known construction of clauses of this nature is confirmed by the judgments of Mathew J. in *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[3] and of Hamilton J. in *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[4]

Those being the obligations if the clause stopped there, there is no question of any option. The parties' rights are defined finally by the words of the clause. But here those words are followed by the phrase " quantity in owners' option, to be de- " clared by the master in writing on commencement of loading." These words seem to me to make all the difference. Whatever quantity the master declares within those limits is to be deemed to be a full and complete cargo for the purposes of the charter. I therefore reject Mr. Kerr's argument, based on the dictum of MacKinnon J.[5] that the words in this charterparty " quantity in " owners' option, to be declared by the master in writing on " commencement of loading " have no contractual effect at all —a somewhat surprising submission.

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[3] (1897) 2 Com.Cas. 173, 177.

[4] [1910] 1 K.B. 627, 629.

[5] 50 Ll.L.Rep. 141, 145.

The declaration required is of an exact quantity, but exact subject to the de minimis rule which applies particularly to commercial contracts. The declaration by the master contains the word "approximative": "the approximative cargo to the holds "will be as follows," and it then sets out tonnage for the individual holds and "total, 10,400 tons." Mr. Kerr submits that the declaration must be construed as if it contained words such as "about" or "thereabouts." He says that that is what "approximative" means, and he relies upon the well-known cases where such words have been used in contracts for the carriage of goods or the sale of goods, and which show that a tolerance greater than the de minimis tolerance is an allowable tolerance. He instanced cases where 3 per cent. or as much as 5 per cent. has been treated as being a compliance with the words "about" or "thereabouts," and points out that here the goods shipped were only 3·14 per cent. less than the quantity declared. It may be, he concedes, that in giving a declaration in this form, containing the word "approximative," the master as agent for the owners committed a breach of contract, but he says that the shippers accepted the notice in this form, that they are not suing for that particular breach of contract, and that the quantity in fact loaded does comply with the notice when full effect is given to the word "approximative." I do not think that the cases on the construction of contracts assist here. What I have to construe is a document purporting to be given under clause 1 of the charter, which therefore purports to be a declaration of an exact quantity within those narrow limits of tolerance which the de minimis rule incorporates in every contract. I think that it is right for me to construe it as one complying with the terms of the contract, if such a construction is open to me. "Approximative" is a word which has no defined limits of tolerance; and I construe it accordingly as referring to those limits of tolerance which the de minimis rule imports into contracts of this kind. I therefore hold that the notice was a good notice.

I am somewhat sorry to come to that conclusion, despite its according in my view with common justice, because that compels me now to construe the "Gencon" exceptions clause, which, although it apparently came into force as long ago as September 15, 1922, has so far escaped construction by the courts. It is my misfortune, apparently, to have to try to make sense of it. The exceptions clause, clause 2 of the charterparty, consists of three printed paragraphs, the third of which has been deleted and typed words substituted for it. The first question which I have to consider is whether, in order to assist myself in construing the paragraphs that remain, I can look at the one which has been deleted. There is a pleasant diversity of authority on this subject which the curious can find conveniently listed in a note in Scrutton on Charterparties, 16th ed. (1955), p. 33. But the court, in construing a contract, is seeking to ascertain the intention of the parties as expressed in the words that they have used. Where there is a standard form of words familiar to commercial men and contained in a printed form in general use, such as the "Gencon" charter, it seems unreal to suppose that when the contracting parties strike out a provision dealing with a specific matter, but retain other provisions, they intend to effect any alteration other than the exclusion of the provision struck out. I cannot, prima facie at any rate, ascribe to them any intention of altering the meaning of the words in the provisions which they have chosen to retain. I say "prima facie" because there may be added or substituted words which drive one to the conclusion that they did intend to ascribe to the words retained a meaning modified by the added or substituted provisions; but, while I think that I must look first at the clause in its actual form without the deleted words, if I find the clause ambiguous, I think that I am entitled to look at the deleted words to see if any assistance can be derived from them in solving the ambiguity, bearing in mind the prima facie rule which I have indicated.

The clause is in these terms: "Owners are to be responsible "for loss of or damage to the goods or for delay in delivery of the "goods only in case the loss, damage or delay has been caused "by the improper or negligent stowage of the goods (stowage to "be under the master's direction) or by personal want of due "diligence on the part of the owners or their manager to make "the vessel in all respects seaworthy and to secure that she is "properly manned, equipped and supplied or by the personal act "or default of the owners or their manager." Then the second paragraph is: "And the owners are responsible for no loss or "damage or delay arising from any other cause whatsoever, "even from the neglect or default of the captain or crew or some "other person employed by the owners on board or ashore for "whose acts they would, but for this clause, be responsible, or "from unseaworthiness, of the vessel on loading or commence-"ment of the voyage or at any time whatsoever. Owners to be "responsible for number of bags signed for in bills of lading," the last words that I have read being those substituted for the printed clause which I shall read later.

Paragraph 1 of this clause is expressly limited to loss of or damage to the goods or to delay in delivery of the goods, and the phrase "the loss, damage or delay" is also plainly so limited. The paragraph is clumsy in form, because it appears to be placing a positive liability for loss, damage or delay arising from certain causes, a liability which would exist at common law quite apart from the clause. It negatives or excludes liability which would exist at common law for damage, loss or delay from other causes only in so far as such exclusion is implicit in the word "only"—"Owners are to be responsible for loss of or "damage to the goods or for delay in delivery of the goods only" in such and such case. One would not expect the draftsman of a clause designed to exclude liabilities which would otherwise exist at common law to rest content with an exclusion which was merely implicit, and, having started with his first paragraph in the positive form, one would expect him to go on to state in express words the exclusion of liability which up to that stage has only been implicit by the use of the word "only." And this, it seems to me, is what he has done, for he goes on: "And"—a conjunctive word consistent with a reference to the same subject-matter as has gone before—"the owners are responsible for no loss or damage or delay," the same phrase as used above where it was clearly limited to loss of or damage to the goods or delay in delivery of the goods, "arising from any other cause "whatsoever." It is not "no loss or damage or delay whatso-"ever," or any other word used to enlarge its meaning, although the word "whatsoever" is used in relation to cause. The paragraph might well have stopped with the words "any other "cause whatsoever," but per majorem cautelam the draftsman goes on to say "even from the neglect or default of the "captain or crew or some other person employed by the owners "on board or ashore for whose acts they would, but for this "clause, be responsible, or from unseaworthiness, of the vessel "on loading or commencement of the voyage or at any time "whatsoever," all of which would have been excluded, one would have thought, by the words "any other cause whatsoever." One finds here, therefore, a draftsman (cautious, no doubt, because of the contra proferentem rule) who is taking the opportunity of saying, in all the ways that he can think of, that the owner is not to be responsible for damage of the kind which is the subject-matter of the exceptions clause other than that arising from particular causes.

There is, I think, ambiguity here. The words "no loss or "damage or delay" in the second paragraph are capable of a wide meaning extending the ambit of the clause beyond what is dealt with in the first paragraph, or are capable of the narrower meaning with which the same phrase was used in paragraph 1 of the clause; that is to say, they are capable of being read as relating to the same subject-matter as the first paragraph, namely, loss of or damage to the goods or delay in delivery of the goods; and, when I look at the third paragraph as it appears in this charterparty, "Owners to be responsible for "number of bags signed for in bills of lading," I find that the third paragraph, like the first, is relating to loss of, damage to, goods.

As I say, there is an ambiguity, and I am accordingly going to look at the deleted paragraph to see if it throws any light upon that ambiguity. The deleted paragraph was in these terms: "Damage caused by contact with or leakage, smell or evapora-"tion from other goods or by the inflammable or explosive nature "or insufficient package of other goods not to be considered as "caused by improper or negligent stowage, even if in fact so "caused." That deals plainly, and deals only, with damage to the goods. It is an exception to the first paragraph of the clause. I see, therefore, that in its printed form, and indeed (though perhaps less cogently) in its substituted form, paragraph 2 is sandwiched between two paragraphs plainly dealing only with loss of, damage to, or delay in delivery of the goods. I find also that I am dealing with a clause which is purporting to limit a common law liability.

Fortified by the two Latin tags, contra proferentes and noscitur a sociis, I am prepared to resolve the ambiguity by holding that the clause is limited to liability for loss of or damage to the goods or delay in delivery of the goods and that it does not cover loss sustained by the charterers owing to the failure of the shipowners to load the contract quantity of goods. That contract quantity I have held to be the quantity declared by the master in the notice given under clause 1 of the charterparty. Accordingly, the plaintiffs succeed.

Declarations accordingly.

Solicitors: *Richards, Butler & Co.; Holman, Fenwick & Willan.*

J. F. L.

1959
March 2, 3.

Lord Parker C.J.

STEPHENS *v.* CUCKFIELD RURAL DISTRICT COUNCIL.

[1958 S. No. 97.]

Town and Country Planning—Maintenance of waste land—"Garden, "vacant site or other open land"—Car breaker's yard in curtilage of building—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 33 (1).

The plaintiff was the owner of a piece of land on part of which, in about 1939, he erected structures for the purpose of a sawmill; the land surrounding the structures was used as a sawmill yard. In 1955 the use as a sawmill was abandoned and the land was let to car breakers, who used the surrounding yard of the premises as well as the old sawmill for car breaking. In 1957 the defendants, the local authority, served a notice on the plaintiff purporting to be pursuant to section 33 of the Town and Country Planning Act, 1947, stating that the condition of the open land within the curtilage of the premises was causing serious injury to the amenity of the district and ordering the removal from the land of all cars, car bodies and machinery. The plaintiff claimed a declaration that the land within the curtilage of his premises referred to in the notice was not a "garden, vacant site or other open land" within the meaning of section 33, and that the notice was of no effect in law:—

Held, that, on the true construction of section 33 of the Act of 1947, the words "garden, vacant site or other open land" had to be limited to a garden, vacant site or other open land which, at any rate, was not within the curtilage of a building; and as, in the present case, the notice specifically referred to open land within the curtilage of the premises, the notice was a nullity.

Quaere. Whether the right test of the application of section 33 is to consider whether, even if the land is not within the curtilage of a building, the existing use of the land is the same as that of the building.

ACTION.

The plaintiff, Horace John Stephens, was the owner of certain woodlands to the north of Parish Lane, Pease Pottage, Sussex. In about 1939 or 1940 the plaintiff erected on those woodlands certain buildings which were used for the purposes of a sawmill. In 1944 or 1945 the original sawmill was destroyed and was replaced by similar structures. The use of those structures for sawmilling purposes was abandoned some time prior to the middle of 1955. At some time in 1955 the plaintiff let part of his land for the purposes of a motor-cycle track. No planning permission was obtained for that use. About November, 1955, the land surrounding the structure began to be used as a car breaker's yard.

By his statement of claim the plaintiff alleged that from about November, 1955, until November 6, 1957, he let the land to Smith Goodwin for use by Sussex Car Breakers Ltd., in the course of their trade, and from November 7, 1957, the land and premises were leased to Sussex Car Breakers Ltd. for 21 years from November 2, 1957, to store vehicles and vehicle spare parts and/or for use as a vehicle workshop and offices in connection therewith. By a deed of variation dated November 21, 1957, the lease was varied so as to add to the purposes for which the land and premises could be used, the dismantling or breaking up of vehicles and/or the adapting for sale of any component parts thereof. The land and premises were used by the plaintiff before those leases from 1939 until about June, 1955, as a sawmill and the curtilage thereof. The land in question was surrounded on three sides by other land belonging to the plaintiff and on the fourth side was bounded by a public road. The plaintiff further alleged that between November 2 and 10, 1957, a continuous fence, six feet high, was erected along the side of the land that adjoined the road, and along the two sides adjacent thereto, and thereafter the land could not be seen from any public place.

The defendants, the Cuckfield Rural District Council, made no admissions as to the leases of the land, but it was agreed that at some date after the commencement of the car breaking user of the land, and before the date of the notice, a wire fence was erected around the land used for car breaking purposes. By their defence the defendants denied that the user of the land could not be seen from any public place.

On April 3, 1957, the defendants, the local planning authority, served on the plaintiff a notice, dated April 2, purporting to be a notice under section 33 of the Town and Country Planning Act, 1947,[1] which related to the land in question and stated, inter alia: "It appears to the said district council in the exercise of their "delegated powers that the condition of open land within the "curtilage of premises to the north of Parish Lane, Pease Pot- "tage, in the rural district of Cuckfield . . . is causing serious

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[1] Town and Country Planning Act, 1947, s. 33 (1): "If it appears to a "local planning authority that the "amenity of any part of the area of "that authority, or of any adjoining "area, is seriously injured by the "condition of any garden, vacant site "or other open land in their area, "then, subject to any directions given "by the Minister, the authority may "serve on the owner and occupier of "the land, in the manner prescribed "by regulations under this Act, a "notice requiring such steps for abat- "ing the injury as may be specified "in the notice to be taken within "such period as may be so specified."

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"injury to the amenity of part of the area of the said rural "district. The said district council in accordance with section 33 ". . . require for the purpose of abating the injury to the amenity "of the area that within six weeks of the date on which this "notice takes effect such steps as are specified in the schedule "hereto shall be taken." The schedule stated: "Remove from "the said land all cars car bodies and machinery." The notice was to take effect on May 8, 1957. On May 6, 1957, the plaintiff appealed to the magistrates' court for Haywards Heath and that court dismissed his appeal on August 12, 1957. On August 24, 1957, the plaintiff appealed from that decision to East Sussex Quarter Sessions, and from the dismissal of that appeal by the appeals committee on November 2, 1957, the plaintiff appealed by way of case stated to the Divisional Court, which appeal was also dismissed.

By the present action the plaintiff claimed a declaration that the land to which the notice related was not a garden, vacant site or other open land within the meaning of section 33 of the Act of 1947, and that the notice served by the defendants on the plaintiff on April 3, 1957, was of no effect in law.

The defendants denied that at any material time either before or after the service of the notice the land was other than land to which section 33 applied, and they contended that whether or not the land was within the curtilage did not affect the application of section 33. They further denied that any specific curtilage attached to the structures used for the purpose of a sawmill, and also denied that the erection of the fence had the effect of making the land other than land to which section 33 applied.

G. G. Baker Q.C. and *Ronald M. Bell* for the plaintiff. The question in this action is whether the land, which is the subject-matter of the notice, is land to which section 33 of the Town and Country Planning Act, 1947, applies. The first point concerns the phrase "garden, vacant site or other open land." The meaning of "garden" is clear; "vacant site" means a place where a building is to be put or where there has been a building. "Other" presumably means land other than a vacant site; "open" in that context must indicate something in the nature of waste ground of the same type and quality as a vacant site. By section 119 (1) of the Act of 1947 "'land' means any corporeal "hereditament, including a building," so that land can include a building. Taking the phrase in its context in section 33 and with reference to the sidenote to the section, which reads "Power to "require proper maintenance of waste land, etc.," one is driven irresistibly to the view that section 33 is dealing with a piece of land which is running to waste, and which is not being used for any industrial purposes in connection with any building. In section 12 of the Act of 1947, which deals with the obligation to obtain permission to develop land, subsection (2) (*d*) refers to "buildings ". . . within the curtilage of a dwelling-house." It may be for that reason that garden has specifically been put into section 33, so that a local council can deal with a garden which is not being properly used. It would be perfectly simple to put section 33 in wider words if it were desired to include in it land which was within the curtilage of a building and used for industrial purposes. The phrase "open space" has a special meaning in Planning legislation and is defined in the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 8 (1), as meaning "any land laid "out as a public garden, or used for the purposes of public "recreation, or land being a disused burial ground," and it may be that for that reason "open land" was used in section 33.

The second point is that the words in question are not appropriate to include any buildings, and one comes back to the concept of this section as one dealing with waste land.

The third point is that the words are not appropriate to cover land within the curtilage of a building. Although curtilage may be a rather vague term, it is the one used in the notice; it may be that it would be better to say that section 33 does not apply to land which is being used for the same purpose as a building. Once one is entitled to use a building for a specific use, it cannot be said that one is not entitled to use the yard for the same purpose.

The fourth point is that if the defendants are right and section 33 can be used in respect of any land, even if it is being used in connection with a user of premises, a landowner would have no rights, in particular none under section 24. The defendants would be able to stop the user altogether, whether it is within or without the curtilage, or they may say that although the plaintiff can carry on the user in the building, he cannot use the yard. The legislature cannot have meant that local authorities should be in a position to stop anyone leaving things on their land; for example, junk or scrap heaps, boxes for collecting produce from the fields in summer time, or scrap from ironworks, etc. There is no question but that this land which the defendants are seeking to make the subject of the notice is within the curtilage of the building in which the car breaking is now carried on. [Reference was made to *Sinclair-Lockhart's Trustees* v. *Central Land Board.*[2]]

The ground around the building was used before 1954 as a sawmill yard when the building itself was used as a sawmill. Could the defendants have served a notice under section 33 in respect of the use of the yard before 1954? Of course one can have a garden which is not within the curtilage: Lord Halsbury L.C. in *Caledonian Railway Co.* v. *Turcan*[3] clearly indicated what is meant by curtilage. Article 2 (2) of the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, states: " . . . references to a building may, except where other- " wise provided, include references to land occupied therewith and " used for the same purposes." Section 33 is not dealing with buildings at all, but land of a specific type. All the way through the Act of 1947 " land " and " building " are linked, but section 33 only deals with land.

D. P. Kerrigan for the defendants. If permission had been granted for the use of the building and the land was included in that permission, the defendants would not have been able to act under section 33 if the land was being properly used. The position of persons such as scrap merchants is protected by Class VIII of the First Schedule to the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950. The Town and Country Planning (Use Classes) Order, 1950, in article 2 (2), defines " light industrial " building " as " an industrial building . . . in which the pro- " cesses carried on or the machinery installed are such as could be " carried on or installed in any residential area without detriment " to the amenity of that area by reason of noise, vibration, smell, " fumes, smoke, soot, ash, dust or grit." Thus it follows that a light industrial user equally cannot injure the amenities in any of those ways.

It has been contended that the words of section 33 must apply to waste land. Most gardens will be within the curtilage of dwelling-houses, and will scarcely be waste land. An open site is usually a piece of enclosed land, although there is no building on it. The words " other open land " are as wide as possible. The plaintiff has referred to the definition of land in section 119 (1) of the Act of 1947, but that section begins with the words

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[2] (1950) 1 P. & C.R. 195; 1950 S.L.T. 283.

[3] [1898] A.C. 256, 263.

". . . except so far as the contrary is provided or the context "otherwise requires," so that when considering "open land" in section 33, that can only be construed as meaning land outside the building itself. That the section intended to deal with land held within the curtilage of industrial buildings is clear when one looks at the defences open to a person served with a notice under section 33. Although the existing user of the building may be a proper user, one can use section 33 to ensure that the owner does not change the user within the class to one which would injure the area. Even if permission has been granted for the user, a notice can be served under section 33 if the land is being misused. The sawmill was a proper use, but there has not been any consent to the present user, although in the present case permission is not now needed for the change of user within the building. But the defendants seek to ensure that that user does not offend against the preservation of the amenities of the area. It is a good defence to the notice under section 33 to show that the loss of amenity results from the operation or user in respect of which permission has been granted, but no permission has been granted to the plaintiff in respect of the present user. In respect of the earlier user no permission was actually granted, but the user of the land for purposes in connection with the sawmill, such as piles of sawdust, etc., would have been protected. This land is not now being used for its original purpose, but for something different, and therefore it is not open to the plaintiff to say that the user of the land is protected.

If the plaintiff were right in his contention that this section is only directed to permissive waste, there would be difficulties in regard to the defences open to a person served with a notice under section 33.

Baker Q.C. in reply. It is admitted that the local authority has no jurisdiction to deal with the user inside the building. It would be an extraordinary result if the court accepts the view that a change of use within the class can give section 33 a wider scope and enable the local authority to attack the use of the land.

LORD PARKER C.J. This case raises a point on which, so far as I know, there is no authority, and is one of some difficulty. It concerns the construction of section 33 of the Town and Country Planning Act, 1947. The matter has had a rather chequered history in that there have already been proceedings in the magistrates' court, an appeal to quarter sessions, and an appeal by way of case stated to a Divisional Court.

The plaintiff is the owner of land near the new town of Crawley, but off the main Brighton road and in a country area. Amongst the land which he owns is a piece of land of Tilgate Forest which, as long ago as 1939–40, he used for the purposes of a sawmill. On that land were put up structures, and the land surrounding the structures was used as a sawmill yard. About June, 1955, the use as a sawmill was discontinued and the user became a user for the breaking up of old motor-cars and the recovery of the parts thereof. I need not go into the details of it; it was, in fact, let to car breakers and is at the moment let to car breakers, and the business of car breaking is carried on not merely in the structure, that is the sawmill itself, but in the surrounding yard of the premises. I think everybody has seen the dumps of old motor-cars about the country, and one has every sympathy with the local authority in this case in trying to have that dump removed. The question is whether they have power under the Act so to do.

That being the position by 1957, the defendants, the local authority, on April 3, 1957, served a notice pursuant to section 33 of the Act requiring the plaintiff, as owner, to remove from the said land all cars, car bodies and machinery, and the said land is there described as open land within the curtilage of the premises.

Section 33, under which that notice was given, is in these terms: "(1) If it appears to a local planning authority that the "amenity of any part of the area of that authority, or of any "adjoining area, is seriously injured by the condition of any "garden, vacant site or other open land in their area, then, "subject to any directions given by the Minister, the authority "may serve on the owner and occupier of the land, in the manner "prescribed by regulations under this Act, a notice requiring such "steps for abating the injury as may be specified in the notice "to be taken within such period as may be so specified." By subsection (2) it is provided that there may be an appeal in the manner provided with regard to an enforcement notice under section 23 (3) to (5) and section 24, subject to modifications to be made by regulations.

It is convenient to refer to the notice served on April 3, 1957, which sets out the provisions in regard to appeal as prescribed by section 23 (4), as modified by regulation 7 (2) of the Town and Country Planning (General) Regulations, 1948, to read as follows: "If any person on whom an enforcement notice is served under "this section is aggrieved by the notice, he may, at any time "within the period mentioned in the last foregoing subsection, "appeal against the notice to a court of summary jurisdiction for "the petty sessional division or place within which the land to "which the notice relates is situated; and on any such appeal the "court—(*a*) if satisfied that the condition of the land to which "the notice relates is such as results in the ordinary course of "events from operations or a use for which permission was "granted under this Part of this Act, shall quash the notice to "which the appeal relates," and then (*c*) is the only other material one: ". . . in any other case shall dismiss the "appeal."

There was an appeal to the magistrates, and there the question was whether the user for car breaking was a use for which permission was granted under this Part of this Act. The point was this, that there being at the appointed day a user for a sawmill, that was, undoubtedly, a general industrial user. If the car breaking business or user for car breaking purposes was also a general industrial user, then the use was not one for which permission was granted by the Act, and the appeal would have to be dismissed, because it is observed that the jurisdiction of the magistrates in the matters which fell for their consideration is limited. If, on the other hand, the user for car breaking could be said to be a light industrial user, then, there being permission under the Town and Country Planning General Development Order, 1950, for a change from general industrial use to light industrial use, there would have been permission under the Act and the magistrates would have had to quash the notice. The point they had to decide, therefore, was: Was user for car breaking a general industrial use or not? They decided that it was; in other words, that no permission had been granted under the Act, and, accordingly, dismissed the appeal. There was an appeal to quarter sessions, where the same point was argued, and again they must have held to the same effect and the appeal was dismissed. From that there was a case stated to the Divisional Court and, as I understand it, the appeal by way of case stated was dismissed. Notwithstanding that, there are these proceedings, and they are proceedings open to the plaintiff because, as I have said, the jurisdiction of the magistrates was limited and they had no power, despite argument addressed to them, to consider the point which now arises in this action as to whether the land in question was a garden, vacant site or other open land within section 33 at all. That matter, as I understand it, was argued, at any rate, at quarter sessions, but it is perfectly clear that there was no jurisdiction to decide the point. Accordingly, in these proceedings the plaintiff claims a declaration that the original notice was void ab initio for the reason that this was not land to which section 33 applied.

It is a short point and not an easy one. The words of the section which I have already read seem to me to be very wide on their face. The section applies to any "garden, vacant site or "other open land," and it seems to me that those three phrases taken together are describing in the widest possible terms any land on which there is no building, land which is not built up. The reason, no doubt, for the use of the words "open land" in that way is to make it perfectly clear that the draftsman is departing from the definition of "land" in section 119 of the Act, where "land" is described as including buildings. That, of course, is subject to the provision that the context should not otherwise require, and it seems to me that section 33 is dealing with any land which has not got a building on it. That, as it seems to me, is the literal interpretation.

It is to be observed—and both sides have referred to it—that the sidenote of the section is in these terms: "Power to require "proper maintenance of waste land, etc.," and it seemed to me at one time that if one was entitled to look at the sidenote, and, indeed, from the very wording of section 33, it might be said that Parliament had in mind the case of permissive waste, allowing a garden, for instance, to run to seed, and a vacant site to become unsightly; but I am quite clear, on further consideration, that there is no such limitation in this case. In particular, if one considers the words of regulation 7 (2) (*b*) of the Town and Country Planning (General) Regulations, 1948, modifying section 23, the words are "if satisfied that the condition of "the land to which the notice relates is such as results in the "ordinary course of events from operations or a use for which "permission was granted," and that clearly envisages not permissive waste, not allowing the land to run to seed, but active operations and user of the land; and, accordingly, prima facie it seems to me that this section covers any operations or user of any open land in the sense of any land which is not built upon.

But, says Mr. Baker, and with considerable force, although that may be the literal interpretation as a matter of construction, reading this section in the scheme of the Act as a whole, there must be a limitation put on the words "garden, vacant site or "other open land." In particular he says that if no limitation at all is put upon those words, then it would follow that under these additional powers, beginning with section 26 and ending with section 33, there is power to prevent the continued user of land which is only being used for a legitimate existing use in connection with buildings, and, as he points out, if that were so it would enable the local authority, if they decided that the amenity of the neighbourhood was being injured, to, in effect, force somebody who had been carrying on a business there for some time to close down, because, I suppose, there are many users for general industrial purposes which cannot be carried on solely within the confines of the building, but where a builder's yard, or scrap heap, or something like that, is vital for the carrying on of the business. Surely, said Mr. Baker, Parliament could not have intended that section 33 should operate in that way. There is clearly no power to prevent the continued existing use of the building itself, and if section 33 were operated it would do in a back-handed way something which under the Act there was no power to do at all.

It is a formidable argument and, as I understand it, Mr. Kerrigan faces that position, but he says it is not quite as bad as it seems, because it will, in fact, only operate in that back-handed way, if I may use that expression, in a case where the use, though within the class of general industrial use, is a user which will affect amenities. Put in this way, he says: Supposing a sawmill had been carried on there, there would have been originally no loss of amenity, or there might be no loss of amenity and the premises could still be carried on for the sawmill and no objection would be taken; but the mere fact that, sawmilling being a general industrial user, there can be a change to car breaking does not, he says, prevent the local authority from saying that the new user, though lawful, is an injury to amenity. It follows, therefore, that even in that limited respect, section 33 is being used to do something for which there is no direct power, namely, to prevent a person carrying on an existing use for which there is no interference short of giving a notice under section 26 and paying compensation.

As I have said, it is not an easy point, but I am inclined, on the whole, to accept Mr. Baker's contention and to say that section 33, properly construed, must be limited to a case where, at any rate, the garden, vacant site or other open land is not within the curtilage of a building, and has not, as it were, acquired the user of that building. He points, in support of that contention, to the fact that in many places in this scheme of legislation, "building" does include, at any rate, the curtilage, and, as is conceded, section 33 cannot apply to buildings, and if one considers that in the treating of buildings under the Act there is included the curtilage, then, said Mr. Baker, there is every reason for construing section 33 (1) as applying to open land which does not form part of the curtilage.

The references that he makes are, first of all, to section 12 (2) (*d*), which, indeed, is the only occasion where curtilage is specifically referred to. That is a proviso to the necessity for obtaining permission for development, and, in effect, it is saying that permission is not required for the use of any building or other land within the curtilage of the dwelling-house for any purpose incidental to the development of the dwelling-house as such.

He also points to the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, where in paragraph 2 (2) there appear these words at the very end: " . . . and " references to a building may, except where otherwise provided, " include references to land occupied therewith and used for the " same purposes." Curtilage is not referred to. It is dealing with the case where the land in question is, as it were, part and parcel of the building occupied and used for the same purpose as the building. In other words, to take the present case, if this had been a change to a light industrial use from a general industrial use, then the permission to do that would cover, not merely the building itself, but would, undoubtedly, cover this yard or area of land round the building.

It seems to me here that, in order to make sense of this scheme of legislation, and to avoid the absurdity to which I have referred, one must limit the words " garden, vacant site or other " open land " to a garden, vacant site or other open land which is, at any rate, not within the curtilage of a building. I appreciate that that may give rise to questions in some cases as to what is, and what is not, within the curtilage of a building, and indeed, as I said, it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order of 1948, the land is occupied with a use for the same purposes as the building; but so far as the present case is concerned, there is no difficulty, because in the notice itself to which I have referred it is specifically dealing with the condition of open land within the curtilage of those premises.

Accordingly, on the view I take of the section, the notice of April, 1957, was a nullity, and, I suppose, all the proceedings that have been taken since have been nullities. I would hold that the plaintiff is entitled to the declaration claimed, which is a declaration that the land in question is not a garden, vacant site or other open land within the meaning of section 33 of the Act, and that the aforesaid notice served by the defendants upon the plaintiff on April 3, 1957, is of no effect in law.

Judgment for the plaintiff.

Solicitors: *Iliffe, Sweet & Co.; Sharpe, Pritchard & Co. for J. A. Churchill, Haywards Heath.*

C. J. E.

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Diplock J.

Contract—Implied term—Performance dependent on permission of third party—Obtaining of permission solely within power of promisor—Knowledge of parties at time of contract that permission might be needed—Implied warranty by promisor.

Shipping—Charterparty—Implied term—Vessel chartered to load goods from Syrian port and proceed to Algeria—Vessel required special permission to load—Not within knowledge of charterers—Syrian authorities prohibited export of grain to Algeria—Implied term as to obtaining permission—Time within which to be obtained.

Ships' Names—The Nizetti.

By a charterparty dated May 17, 1956, it was agreed that the *S.S. Nizetti* should "proceed to Lattakia [Syria] or so near thereto "as she may safely get" and there load a full cargo and then "proceed to one or two ports in charterers' option, out of Philippe-"ville, Alger or Oran."

On September 23, 1954, the Syrian legislature, by decree, made certain provisions prohibiting trade with Israel, and as a result vessels which had called at Israeli ports were refused permission to load, although such permission might be granted if their owners offered sufficient guarantees to the authorities against non-repetition of infringements of the boycotting provisions.

During February, 1955, the *Nizetti* discharged cargo at Haifa, Israel. Thereafter she passed through the Suez Canal at least four times and on each occasion the master signed a declaration of future non-co-operation with Israel. At the date of the charterparty the shipowners knew that the *Nizetti* had called at Haifa and that the master had made declarations of future non-co-operation with Israel, but the charterers neither knew nor ought to have known that.

The *Nizetti* arrived at Lattakia under the charterparty on

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May 28, 1956, but was refused free pratique. On May 30, the master made a declaration of non-co-operation with Israel, but was still refused permission to load. On June 2, the Syrian authorities prohibited the export of grain to Algeria which took effect from June 3. On June 5 the *Nizetti* sailed from Lattakia. The charterers claimed damages alleging breach of the charterparty:—

Held, (1) that, since it lay solely within the power of the shipowners and outside the power of the charterers to obtain the permission to load, a term must be implied in the charterparty, to give business efficacy to the contract, that the shipowners would at least exercise reasonable diligence to obtain the permission.

(2) That, since the shipowners knew but the charterers neither knew nor ought to have known at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners, not only that they would use due diligence to obtain, but that they would in fact obtain whatever permission was necessary within a reasonable time; what was to be implied in such circumstances was the obligation least onerous on the party upon whom it was imposed which would, nevertheless, give business efficacy to the contract.

Such reasonable time had not expired when the embargo took effect on June 3, 1956; accordingly, the charterers had failed to establish any breach of warranty on the part of the shipowners before the charterparty was frustrated on June 3 by the embargo.

Per curiam. If both parties had known or ought to have known at the date of the charterparty that permission to load might be needed, the only warranty to be implied would have been that the shipowners would use reasonable diligence to obtain the permission.

SPECIAL CASE under section 21 (1) (*b*) of the Arbitration Act, 1950.

The charterers, Compagnie Algerienne de Meunerie, by a charterparty in the "Gencon" form, dated May 17, 1956, chartered from the shipowners, Katana Societa di Navigatione Marittima, S.P.A., the Italian *S.S. Nizetti*, stated to be "now "trading and expected ready to load under this charter about "May 24, 1956." It was agreed "That the said vessel shall pro"ceed to Lattakia or so near thereto as she may safely get and lie "always afloat, and there load a full and complete cargo of 2,750 "(two thousand seven hundred and fifty) metric tons, 5% more "or less, quantity in master's option to be declared on giving "notice to shippers. Wheat in bulk, charterers to supply up "to 5% of bagged cargo, as demanded by the master for safe "stowage . . . and being so loaded the vessel shall proceed to one "or two ports in charterers' option, out of Philippeville, Alger "or Oran."

By clause 2, the charterparty read: "Owners are to be "responsible for loss of or damage to the goods or for delay in

" delivery of the goods only in case the loss, damage or delay " has been caused by the improper or negligent stowage of the " goods or by personal want of due diligence on the part of the " owners or their manager to make the vessel in all respects sea-" worthy and to secure that she is properly manned, equipped " and supplied or by the personal act or default of the owners or " their manager. . . . And the owners are responsible for no loss " or damage or delay arising from any other cause whatsoever, " even from the neglect or default of the captain or crew or some " other person employed by the owners on board or ashore for " whose acts they would, but for this clause, be responsible, or " from unseaworthiness of the vessel on loading or commence-" ment of the voyage or at any time whatsoever. . . ."

By clause 5: " Cargo to be loaded, stowed and trimmed by " charterers' stevedores free of expense to the vessel at the " average rate of 800 tons per weather working day of 24 con-" secutive hours, Sundays and holidays excepted. Time to " commence at 2 p.m. if notice of readiness to load is given before " noon and at 8 a.m. next working day if notice given during " office hours after noon. Telegraphic notice to be given to the " shippers' agents. . . ."

By clause 11: " Laydays not to commence before May 24 " and should the vessel not be ready to load (whether in berth " or not) on or before May 31, 1956, charterers have the option " of cancelling this contract, such option to be declared, if " demanded, at least 48 hours before vessel's expected arrival at " port of loading. . . ."

The following facts were found by the umpire: " 6. On Sep-" tember 23, 1954, the Syrian Legislature by Legislative Decree " No. 68, made certain provisions with regard to the prohibition " of trade with Israel," referred to as the Syrian Law of 1954. " By an Instruction relating to the application of this Legisla-" tive Decree issued by the Syrian Ministry of National Economy " foreign vessels were forbidden to anchor in Syrian ports if they " had previously called at an Israeli port. Paragraph 2 of the " said Instruction provided that a vessel coming within the scope " of this provision would be placed on a blacklist, and deprived " of the right to load or discharge, or to take on water, fuel, " food and other necessities. Paragraph 4 of the said Instruction " stated that the Ministry of National Economy was empowered " to remove vessels from the blacklist if their owners offered " ' sufficient guarantees against non-repetition of infringements " ' of the boycotting provisions.'

"7. During February, 1955, the *Nizetti* discharged cargo at "Haifa in Israel. Between February, 1955, and the date of the "charterparty the vessel passed through the Suez Canal at least "four times without being detained for any substantial period, "the master on each occasion signing a declaration of future "non-co-operation with Israel.

"8. At 1200 hours on May 28, 1956, the vessel anchored in "the roads at Lattakia preparatory to loading under the charter-"party, and at 1500 hours the vessel was moved to a closer "anchorage. Immediately after the vessel had moored a police "officer examined the vessel's minutes and hatch log-book. The "master was informed that free pratique would not be granted, "and was instructed not to communicate with the shore pending "a decision by the military command of the city.

"9. On the following day the respondents' brokers were "informed by the claimants' brokers of the refusal to grant free "pratique and this information was conveyed by cable to the "respondents. The respondents thereupon cabled to the master "instructing him to sign a declaration of future non-co-operation "with Israel. The master was, however, still forbidden to land "and consequently did not receive this cable, which awaited him "at the agents' office. During the latter part of the same day "(May 29, 1956) the Syrian Government prohibited the export "of grain to France and to French colonies. (This prohibition "is hereinafter called 'the temporary embargo.')

"10. On May 30, 1956, the master was permitted to land and "received the respondents' cable of the previous day. He there-"upon made a declaration of non-co-operation with Israel. The "Syrian authorities nevertheless persisted in their refusal to "allow the vessel free pratique.

"11. On May 31, 1956, the Syrian Government relaxed the "temporary embargo in favour of vessels which had already "begun to load, but the vessel"—that is, the *Nizetti*—"was "unable to begin loading since the authorities maintained their "refusal to grant free pratique.

"12. On June 2, 1956, the Syrian Council of Ministers by "Decision No. 568 prohibited the export of grain to Algeria. "This prohibition (which is hereinafter called 'the final em-"'bargo') took effect from June 3, 1956. On June 5, 1956, the "vessel sailed from Lattakia, after being allowed to take on a "quantity of fresh water and stores."

The umpire further found in paragraph 15 of the case that: "(1) The vessel began the approach voyage to Lattakia in due time "and proceeded there with due dispatch . . . (3) The respondents "and the master acted with reasonable diligence with regard to the "making of the declaration of future non-co-operation with Israel. "(4) On May 28, 1956, and all material times thereafter the claimants were ready, willing and physically capable of shipping a "contractual cargo in accordance with the terms of the charter-"party. They did not at any material time exercise the right of "cancellation provided by clause 11 of the charterparty. (5) If "the vessel had remained at Lattakia after June 5, 1956, it would "not have been possible, by reason of the final embargo which is "still in force,"—that was at the date of the case stated, which was August, 1958—"to load the contractual cargo or any part "thereof on board the vessel for carriage to Algeria within such a "time as would not have frustrated the commercial purpose of "the charterparty. (6) It was not proved that the vessel was "at any material time on the Syrian blacklist or that the Syrian "authorities refused to grant the vessel free pratique in exercise "of the powers prescribed in the [Syrian Law of 1954]. . . . "Upon examining the vessel's log-book, if not before, the Syrian "authorities found out that the vessel had discharged cargo at "Haifa in 1955. They used this fact as an expedient for delaying "the loading of the vessel until such time as an embargo should "come into force. Although, if the final embargo had not been "imposed, the Syrian authorities would ultimately have allowed "the vessel to load her cargo within such a time as would not "have frustrated the commercial purpose of the charterparty, "the decisive and/or efficient and/or effective cause of the non-"performance of the charterparty was the fact that the vessel "had discharged cargo at Haifa in 1955. (7) At the time of "the negotiation and execution of the charterparty, the respondents knew that the vessel had called at an Israeli port "during February, 1955, and knew or ought to have known of "the existence and effect of Legislative Decree No. 68 and of "the Instruction relating thereto. The respondents also knew "that on previous occasions the master had made declarations "of future non-co-operation with Israel. The claimants did "not at the time of the negotiation and execution of the "charterparty know that the vessel had called at an Israeli "port or that the master had been required to make the "aforesaid declarations. . . . (9) By agreeing that the vessel "should load the contractual cargo at Lattakia the respondents "impliedly warranted that the vessel was not at that time "subject to any restriction which would delay or prevent the vessel "loading the said cargo at Lattakia. (10) The non-performance "of the charterparty was a direct consequence of the respondents' "breach of the aforesaid warranty and the respondents are not "entitled to rely upon the final embargo as a frustrating event "which discharged them from performing their obligations under "the charterparty." The umpire found that the charterers were entitled to recover from the shipowners the loss directly occasioned by the breach, which he assessed at £4,573 19s. 7d.

The questions of law for the court were whether, on the facts found and on the true construction of the charterparty, (a) the shipowners committed any breach of their obligations under the charterparty, and (b) the charterers committed any breach of their obligations under the charterparty.

A. A. Mocatta Q.C. and *J. F. Donaldson* for the shipowners. The questions are: (1) What is the nature of the obligation imposed on the shipowners? (2) Was that obligation fulfilled? (3) If it was not, did it give rise to the damages claimed? The material facts are: that there is no finding that the *Nizetti* was on the Syrian blacklist; that it is expressly found that local law was only used as an expedient until such time as the final embargo on the export of goods to France and the French colonies was imposed; that it was quite uncertain and hypothetical whether the *Nizetti* was under any disability at all; and, if there were any difficulties, the master (as he had done on four previous occasions) only had to give a declaration of future non-co-operation with Israel, as he did. Against that background of facts the shipowners' only obligation was to act with due diligence, which they did by making the required declaration. [Reference was made to Scrutton on Charterparties, 16th ed., p. 102, and *Levy* v. *Costerton*.[1]] If the shipowners are wrong as to the extent of their obligation, they are protected by the exemption clause.

John Megaw Q.C. and *R. A. MacCrindle* for the charterers. The first question is: Was the umpire right in holding that the shipowners were in breach of contract? The salient facts are, first, that the charterparty provided that the "vessel shall "proceed to Lattakia . . . and there load a full and complete "cargo . . ." On the face of it, that is an obligation or an undertaking on the part of the shipowners that the *Nizetti* will go to the port of Lattakia and that she shall there be able to load her cargo. The second relevant fact is the existence at the time when the charterparty was made of the Syrian Law of 1954. The blacklist is merely part of the machinery, and there is no requirement of law that the vessel shall be placed on such a list at any specific time, nor does one know if indeed there is a specific list or document. The third fact is that the *Nizetti*, prior to the charterparty, had called at an Israeli port. The essential part of the umpire's finding in paragraph 15 (6) of the case is that the Syrian authorities "used this fact as an expedient "for delaying the loading of the vessel until such time as an "embargo should come into force." That can only mean that the Syrian authorities used it as an expedient by reference to the previous law set out in the case, namely, the Syrian Law of 1954, otherwise a previous call at an Israeli port by the *Nizetti* would be irrelevant. The reason why the Syrian authorities delayed loading was to enable the final embargo to come into operation, and for that reason it is said to be an expedient, because it was being used for an ulterior motive. If that is wrong, then it necessarily follows that the charterers fail, because in order to establish a breach of contract they have to show that it was a defect of the *Nizetti* which caused or enabled the Syrian authorities to refuse permission to load in the ordinary way.

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[1] (1816) 4 Camp. 389.

[Diplock J. You have to show that the ship had "qualities" which prevented her, as a matter of Syrian law, from calling at Lattakia.]

Yes, and it is submitted that that is proved because of the finding in paragraph 6 that the Syrian Law of 1954 "provided "that a vessel coming within the scope of this provision would "be placed on a blacklist." That is an automatic consequence of the vessel previously having called at an Israeli port. The discretion of the Syrian authorities does not arise until the next stage. If that be right, then one has to consider whether there was a breach of contract in that the vessel was under a disability. In that case the law is quite clear. Notwithstanding that the *Nizetti* was under a disability, having previously called at an Israeli port, the Syrian authorities might license her to load. The owners knew or ought to have known that the ship required such a licence which might or might not be given. The charterers did not. Therefore there must be implied an absolute warranty that the licence or permission necessary under Syrian law will be obtained. There is no absolute warranty that a party will obtain a licence by the local authority giving "free pratique," but that is because it is a matter known to both parties. In the

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present case the facts were known only to one party, the shipowners. The umpire has held that there was at the date of the charterparty a restriction which would delay or prevent the vessel from loading at Lattakia, and that that restriction did prevent loading. That restriction can only be the Syrian Law of 1954, and so the umpire is finding and holding that it was that Syrian Law which prevented loading. One then returns to subparagraph (6) of paragraph 15, which, if possible, must be given a meaning. If, as the umpire held, the Syrians were acting under their decree without specific proof, then that is conclusively in favour of the charters.

The absolute warranty for which the charterers contend is: the shipowners warrant that the permission required under the Syrian law will be granted by the time when, apart from any question of necessity to obtain permission to load, the *Nizetti* would be ready to load. There is, of course, an obligation on the owners to proceed with all due diligence. The necessity for obtaining the licence cannot be used by the owners as justifying delay; it is an absolute obligation on the owners. The essential facts on the point of the absolute warranty are that at the date of the charterparty the shipowners knew or ought to have known, and therefore must have been deemed to have known, that the *Nizetti* was suffering from this particular disability. They knew of the facts as to the necessity for obtaining permission. The charterers did not know and could not have known, unless they had been told that the *Nizetti* had previously called at Haifa. Therefore the shipowners knew or were deemed to know that there was a special factor affecting the ship in a way that she could not load at Lattakia unless steps were taken by the shipowners to obtain permission. It was therefore an obligation on the shipowners to apply for and obtain the permission and to give the required undertaking. The shipowners never obtained the permission, and it was because of that that the vessel was prevented from loading. By analogy one can compare this case with the cases where a licence is needed for export or import of goods. Where, by the law of the place from which goods are to be exported, a licence is required, and that licence is not obtained and the goods are not shipped, an action for damages can be brought by the buyers against the sellers, and two questions arise: (1) on whom is the obligation to obtain the licence, and (2) is that obligation to obtain the licence absolute or is it to take all reasonable steps to obtain the licence? Where the contract contains no express provision such as "subject to licence" and the party whose duty it is to get the licence knows of that necessity and the other party does not, the duty is absolute. Where, in fact, the law of the place of performance contains a licensing system and the contract does not contain any term for obtaining that licence, a term must be implied into the contract and it is either an obligation to use all reasonable diligence or an absolute warranty.

In the present case it cannot be assumed that the charterers would say "If you make reasonable efforts to get a licence and "do not succeed, you are excused." It follows that this contract cannot be subject to the implied term that the owners will be excused from liability if they used reasonable diligence, but failed, If they were not prepared to take the responsibility for their inability to obtain permission, they should have disclosed it to the charterers when making the contract. [Reference was made to *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*[2]] It would be impossible to imply the acceptance by one party of a term that the other should be discharged if he failed to obtain a licence of which the first party knew nothing. *Peter Cassidy Seed Co. Ltd.* v. *Osuustukkukauppa I.L.*[3] supports the proposition that where a contract says nothing at all about an export licence and the existence of it is known only to one party, an absolute warranty is to be implied and not a conditional warranty. From that case it appears that where parties must be taken, from the words that they have used or from surrounding circumstances properly in evidence, to have assumed that a licence would be granted, then the term to be implied is an absolute one. The correct approach is, first, to ascertain what is the true construction of the contract that the "vessel shall proceed to Lattakia ". . . and there load"; and then to see whether there is an exception clause in the contract which is relevant to the obligation; but no exception clause in the charterparty can be construed so as to defeat an express term of the contract unless by clear and precise words it does have that effect.

As regards the exception clause here, once it is established that the obligation is an absolute one to obtain a licence, it is impossible to rely on the exception clause because the exception clause excludes from its scope any loss, damage or delay which arises from the neglect or default of the shipowners. If the obligation to obtain a licence be absolute, the exception clause

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[2] [1951] 2 Lloyd's Rep. 89.

[3] [1957] 1 W.L.R. 273; [1957] 1 All E.R. 484.

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does not operate at all, because what is seeking to be excused is the failure to perform the obligation of the owners, namely, to get a licence.

Clause 1 of the charterparty must be construed independently of clause 2, and then one has to see whether what has happened is properly said to be a breach of the personal obligation of the owners. Loss, damage or delay of any sort which arises from the personal act or default of the owners is not within the purview of the second subclause in clause 2, and therefore clause 2 as an exception is of no avail to the shipowners. That is a full and complete answer to any argument on the exception clause. As an alternative, the second subclause is in fact related solely to the same type of loss or damage or delay as the first subclause. That obviously does not cover failure of the ship to get to the port of loading. In fact the subclause should be construed against the shipowners for whose benefit it is put in as referring to the same subject-matter—loss or delay in relation to the goods. [Reference was made to *Ciampa* v. *British India Steam Navigation Co. Ltd.*[4]]

In the present case Syrian law was such that when the *Nizetti* arrived at Lattakia she was bound to be held up, and that was the existing law at the date of sailing. There is established here a breach of contract by the shipowners. The exception clause does not relieve them of the consequences of that breach, and the loss suffered was properly held by the umpire to have followed as a consequence of the breach of contract.

A. A. Mocatta Q.C. in reply. Express provisions do not assist the charterers. The *Nizetti* went to Lattakia " or so near thereto " as she may safely get." Those words apply to political as well as physical impediments. But for the embargo, the shipowners would have been able to load because they would have eventually been given permission; so there is no breach of any express obligation. In considering whether there has been a breach of an implied obligation, one has to see whether there was any provision of local law imposing any shackle, restriction or impediment on the *Nizetti*. No such restriction is to be found in the facts found by the umpire. The real point seems to be whether the *Nizetti* was blacklisted. She had discharged cargo at Haifa in 1955, and the Syrians as a result held up the *Nizetti* at Lattakia in an arbitrary manner. It could not be said that there was to the knowledge of the shipowners some law in force in Syria at the time when the contract was made or thereafter which put any absolute obligation on the shipowners. If there was some arbitrary action by the Syrian authorities saying "We will not "allow your ship to load unless you give us an undertaking about "non-co-operation with Israel in the future," the shipowners were under a duty to act reasonably to try to comply if they could, and there is a finding that the shipowners gave that undertaking. To find in favour of the charterers the court would have to be satisfied that there was a provision of Syrian law which applied to the *Nizetti*, and the charterers have failed to show that. If they had shown that, one would have to see what obligation there was apart from the exemption clause. The charterers have put the obligation far too high. Why should the obligation be any higher than that the shipowners should get a licence within a reasonable time after the ship reached Lattakia? It is found in the case that they made their declaration of future non-co-operation with Israel within a reasonable time and that, but for the embargo, they would have been allowed to load. Business efficacy does not demand the absolute warranty for which the charterers contend. But for the embargo there was nothing to show that the shipowners would not have got permission to load before the cancelling date. On the question of what implication should be drawn, *Cunningham* v. *Dunn* [5] is very close on the facts.

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[4] [1915] 2 K.B. 774.

The *Ciampa* case [6] was merely a decision that an exception clause did not apply if the ship was inevitably doomed to be unable to perform the contract, and is distinguishable from the present case. The law at Lattakia cannot be put any higher against the shipowners than that there was some risk of difficulty. The owners had no difficulty on at least four occasions when going through the Suez Canal in satisfying the requirements there, and they were entitled to regard the requirements at Lattakia as being no more difficult to satisfy. The charterers have failed to establish any term of the contract that the shipowners have broken, and therefore fail in limine. If they have established a breach of contract, then one has to see whether the exception clause is of assistance.

DIPLOCK J. in stating the relevant facts said: The contract also contains the exceptions clause in the "Gencon" form on which the owners claim to rely if necessary. In the view which I take, it is not necessary for them to do so and I do not propose, therefore, to deal with the not inconsiderable difficulties of construction which this clause presents.

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[5] (1878) 3 C.P.D. 443.

[6] [1915] 2 K.B. 774.

It is not clear from the umpire's findings whether the prohibition of anchorage was automatic, subject to the discretionary power of the Ministry to remove it, or whether it only operated when the vessel was placed on the blacklist. But that any prohibition thereunder could be withdrawn as a matter of the Ministry's discretion is clear.

It is not, I think, suggested that the knowledge of the owners of the applicability of the Legislative Decree No. 68 and of the Instruction relating thereto (which I shall refer to as the Syrian Law of 1954) was any breach of the warranty contained in the words: "expected ready to load under this charter about May 24, "1956," no doubt because, in view of their Suez experience, the expectation on the part of the owners was honestly held and based on reasonable grounds (see *Samuel Sanday & Co.* v. *Keighley, Maxted & Co.*[1]).

While there is a finding that the claimants were ready, willing and physically capable of shipping a contractual cargo in accordance with the terms of the charterparty, it would, on the umpire's findings as to the temporary embargo and the permanent embargo, have been unlawful for them to do so after the latter part of May 29 because the embargo was only suspended in respect of vessels which had already started loading before that date.

[His Lordship continued:] The position, therefore, seems to be that if the *Nizetti* had been allowed to load on arrival she would have been stopped by the temporary embargo late on May 29; loading could have been resumed on May 31, when the temporary embargo was lifted off the ships which had already begun to load and could have continued up to June 2. I take the umpire's findings to mean that in this event she could have loaded a full cargo, but unless she had started to load before the latter part of May 29 she could never lawfully have loaded at all because the temporary embargo was never lifted in respect of vessels which had not started to load before it was imposed.

This is not a case of inadequate documentation which would have been a breach of warranty of seaworthiness (see *Levy* v. *Costerton*[2]), nor is it a case, as it was in *Ciampa* v. *British India Steam Navigation Co. Ltd.*,[3] where the vessel, at the time the charter was fixed, was to the knowledge of the owners, not shared by the charterers, foredoomed to inability to carry the contractual cargo, which would indeed be a breach of the warranty "expected "ready to load."

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[1] (1922) 27 Com.Cas. 296; 38 T.L.R. 561.

[2] (1816) 4 Camp. 389.

[3] [1915] 2 K.B. 774.

There is an express finding of fact by the umpire in paragraph 15 (6) that "if the final embargo"—that is to say, on the export of grain to France and the French Colonies—"had not been "imposed, the Syrian authorities would ultimately have allowed "the vessel to load her cargo within such a time as would not "have frustrated the commercial purpose of the charterparty." What in the event frustrated the charterparty was the imposition of the final embargo on June 3, 1956, which made it unlawful for both charterers and owners to perform their respective duties under the contract, for it is not suggested that the charterers at any time prior to June 2 exercised their contractual right of cancellation under clause 11, or any right which they may have had to treat the charterparty as rescinded for breach of condition on the part of the owners.

The question, therefore, is whether at any time before the beginning of June 3, 1956, the owners were guilty of any breach of warranty and, if so, what damage did that breach cause. It is not contended, quite apart from any exceptions clause, that there is an absolute warranty that the vessel will get to Lattakia and there load a full and complete cargo. Such a contention would ignore the words "or so near thereto as she may safely get." It is well settled that this qualification is not limited to physical obstacles. Prohibition of entry into a named place by the authority having jurisdiction in that place, prima facie entitles the owner to rely on the right to proceed to this alternative place (see *Dahl* v. *Nelson, Donkin & Co.*[4]).

The charterers are thus driven to rely upon some implied term in the charterparty. Mr. Megaw contends, I think rightly, that the effect of the Syrian Law of 1954 which was in force at the time when the charterparty was entered into was to make the *Nizetti* a vessel of a class which did, or at least might, require permission or licence from the Syrian authorities to load any cargo at Lattakia. Such permission could be obtained only by the shipowners, because, at any rate if the vessel were placed on the blacklist, a guarantee from them that she would not again call at an Israeli port was the condition precedent to such permission being granted. It lay, therefore, solely within the power of the shipowners and outside the power of the charterers to obtain the permission if it should become necessary to give business efficacy to the contract.

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[4] (1881) 6 App.Cas. 38.

In these circumstances there must at least be an implied warranty by the shipowners that they will use reasonable diligence to obtain the necessary permission to load the cargo on the vessel. If the necessity or possible necessity of such permission were known or ought to have been known to both parties when the charterparty was entered into, then I think that the only warranty to be implied would have been that the shipowner would use reasonable diligence to obtain the permission. But there is the finding of fact by the umpire, which I have already read, that the claimants did not at the time of the negotiation and execution of the charterparty know that the vessel had called at an Israeli port, or that the master had been required to make the declaration of non-co-operation. I think it proper to infer from this finding not only that the charterers did not know, but that there was no evidence that they ought to have known, that the *Nizetti* had called at an Israeli port and, therefore, they neither knew nor ought to have known that the *Nizetti* fell into the special category of vessels for which permission might be needed under the relevant Syrian Law of 1954 before it could load any cargo at Lattakia. In the absence of such knowledge on the part of the charterers at the time the charterparty was entered into, I am prepared to hold, although I do not think that any of the cases cited really assists me in this, that there was an implied warranty by the shipowners not merely that they would use due diligence to obtain, but that they would in fact obtain whatever permissions to carry cargoes were necessary under the Syrian Law of 1954 which was in force at the time that the charterparty was entered into and applicable to vessels of the category into which the *Nizetti* as they, the shipowners, knew, but as the charterers neither knew nor ought to have known, fell.

But even if I am prepared to hold that such a warranty is to be implied, there is still a time factor to be considered. What is the period within which the shipowners warrant that any permission to load the *Nizetti* which may be required under the Syrian Law of 1954 shall be obtained? We are dealing here with an implied term, placing on one of the parties obligations not expressed in the contract, and I apprehend that what is to be implied in such circumstances is the obligation least onerous on the party upon whom it is imposed which will, nevertheless, give business efficacy to the contract.

It seems to me that the highest at which the warranty on the part of a shipowner may be put is that he will (a) exercise due diligence to obtain, and (b) will in fact obtain, within a reasonable time, any permission to load the vessel which is required under the Syrian law in force at the time when the charterparty was entered into.

So far as (a) is concerned—that is to say, due diligence—there is the finding of the umpire, to which I have already referred, that "The respondents and the master acted with "reasonable diligence with regard to the making of the declara-"tion of future non-co-operation with Israel," and I think it can legitimately be inferred from the other findings of fact which I have already quoted, that this is tantamount to a finding that the respondents used due diligence to obtain any permission to load the vessel which was required under the Syrian Law of 1954 in force at the time when the charterparty was entered into.

So far as (b) is concerned, the relevant question, in order to see whether there was a breach of warranty by the shipowners before the contract was frustrated, is: What was a reasonable time? The umpire has not specifically applied his mind to this question, understandably enough, because the arguments addressed to him were in a somewhat different form from those which have been addressed to me, as often happens in cases stated. It seems to me, however, that a reasonable time for obtaining the necessary permission—subject, of course, to due diligence being used—must extend to the moment at which the commercial purpose of the charterparty would be frustrated.

What that time is is, no doubt, a mixed question of fact and law. But in so far as it is a question of fact, it is, I think, implicit in the findings of fact that such time had not expired when the final embargo took effect on June 3, 1956; the finding of fact to which I refer being the umpire's finding that ". . . if "the final embargo had not been imposed the Syrian authorities "would ultimately have allowed the vessel to load her cargo "within such a time as would not have frustrated the commercial "purpose of the charterparty." In so far as what is a reasonable time is a question of law, I am certainly not prepared to hold that apart from the embargo the contract would already have been frustrated by midnight on June 2, if loading had been prevented by some other cause outside the control of the parties until that date but not of a permanent character.

I may add, although in view of what I have held it does not, I think, matter, that to establish a breach of warranty for which anything but nominal damages would be recoverable the charterers would have to show that a reasonable time for obtaining the permission had expired before "the latter part"—to use the umpire's words—"of May 29," because any permission given under the Syrian Law of 1954 thereafter would have been effective to enable the charterers lawfully to start to load their contractual cargo of grain for Algeria once the temporary embargo had been imposed.

It is no doubt because he recognises that any allowance of a reasonable time after the arrival of the *Nizetti* in Lattakia roads for the shipowners to obtain any necessary permission under the Syrian Law of 1954 would impose grave difficulties in the way of any claim for damages on the part of the charterers that Mr. Megaw contends that the terms of the implied warranty are that the owners warrant that the permission required under the Syrian Law of 1954 will be granted by the time when—apart from any question of necessity to obtain any such permission—the vessel would be ready to present herself for loading. But this is being wise after the event. It does not seem to me that a term so onerous on the shipowner was necessary to give business efficacy to the contract on May 17, 1956, when it was entered into. At that time neither party could foresee that there would or even might be an embargo on the export of wheat from Syria to Algeria, much less that it would be imposed on ships which had not started to load before the latter part of May 29, 1956. And in the absence of such foresight a warranty by the shipowner that he would use due diligence to obtain, and would in fact obtain within a reasonable time, any necessary permission to load the cargo on his vessel would, I think, be considered by each party and by the officious bystander, if present, to be amply sufficient to give business efficacy to the contract.

I hold, therefore, that even if, what be the fact, the *Nizetti* was refused free pratique because she fell within the category of vessels covered by the Syrian Law of 1954, the claimants have failed to establish any breach of warranty on the part of the respondents before the charterparty was frustrated on June 3, 1956, by the coming into effect of the final embargo on the export of grain from Lattakia to Algeria.

But even if I were wrong as to this, there is a further difficulty with which Mr. Megaw is faced, which logically, perhaps, comes first, but which I deal with second because had it been the decisive point in the case I should have had to consider whether I ought not to remit the case to the umpire for some further elucidation of his findings.

The umpire found in paragraph 15 (6) of the special case: "It was not proved that the vessel was at any material time on "the Syrian blacklist, or that the Syrian authorities refused to "grant the vessel free pratique in exercise of the powers prescribed in the [Syrian Law of 1954]. Upon examining the "vessel's log-book, if not before, the Syrian authorities found out "that the vessel had discharged cargo at Haifa in 1955. They "used this fact as an expedient for delaying the loading of the "vessel until such time as an embargo should come into force. "Although, if the final embargo had not been imposed the Syrian "authorities would ultimately have allowed the vessel to load "her cargo within such a time as would not have frustrated the "commercial purpose of the charterparty, the decisive and/or "efficient and/or effective cause of the non-performance of the "charterparty was the fact that the vessel had discharged cargo "at Haifa in 1955."

The first sentence seems to be saying, quite clearly, that it was not established either that the *Nizetti* required permission to load under the Syrian Law of 1954 or, at any rate, that it was not established that the absence of such permission was the cause of the refusal of free pratique.

Mr. Megaw asked me to read the paragraph as a whole, saying in effect that while there was no direct evidence that free pratique was withheld in the exercise of powers under the Syrian Law of 1954, the umpire has drawn and expressed an inference of fact which he was entitled to draw that the *Nizetti* was in fact refused free pratique under that legislation. This contention is, I think, really based on the absence of any reference in the case stated to any other Syrian law under which free pratique could have been withheld. But the assumption that the Syrian authorities must have acted under some law is based on the further assumption (which I am not prepared to make without evidence) that the rule of law as we know it in England is uniformly applied in Syria. That the umpire made any such assumption is, I think, negatived by his use of the word "expedient." No expedient was necessary if the *Nizetti* was disqualified from obtaining free pratique without permission under the Syrian Law of 1954. All the authorities had to do was to apply that law.

This subparagraph, read as a whole, seems to me to be consistent and consistent only with a finding that the delay in granting free pratique was a high-handed action taken by the Syrian authorities, no doubt for good political reasons, for which the fact that the vessel had in 1955 discharged cargo in Haifa and not the

Syrian Law of 1954 formed the ostensible excuse. If the *Nizetti* had never called at Haifa, this ostensible excuse would not have been available, and it may be that the last sentence of the subparagraph by the umpire contains a finding by him that in the absence of that ostensible excuse free pratique would not have been withheld. But, on any view, would that suffice to enable the charterers to succeed here, for it cannot be suggested that the shipowners warranted that the *Nizetti* had never called at an Israeli port or that she had never done anything which the Syrian authorities might seize upon as an excuse for refusing free pratique, irrespective of any provisions of Syrian law in existence at the date at which the charterparty was entered into?

I do not think that any further light is thrown on the meaning of this subparagraph by the contents of subparagraphs (9) and (10) of paragraph 15. Subparagraph (9) reads: "By agreeing "that the vessel should load the contractual cargo at Lattakia "the respondents impliedly warranted that the vessel was not "at that time subject to any restriction which would delay or "prevent the vessel loading the said cargo at Lattakia." Subparagraph (10) reads: "The non-performance of the charterparty "was a direct consequence of the respondents' breach of the "aforesaid warranty and the respondents are not entitled to rely "upon the final embargo as a frustrating event which discharged "them from performing their obligations under the charterparty. "The claimants are entitled to recover the loss directly occasioned "by the aforesaid breach."

Subparagraph (9) is a finding of law as to an implied warranty which I hold to be wrong, at any rate unless the qualifying words "beyond a reasonable time" are inserted after the word "delay."

Subparagraph (10), I think, merely refers one back to subparagraph (6) to see of what facts the non-performance of the charterparty was the direct consequence, and there "the decisive "and/or efficient and/or effective cause" is expressed in the terms that I have already examined.

The findings are not as clearly expressed as one could have wished. But I think that on analysis their meaning is sufficiently plain, and in any event, having regard to the other ground on which I am prepared to decide this case, no useful purpose would be served by remitting it to the umpire for further elucidation. In criticising certain obscurities in the paragraph to which I have referred I should like, in compensation, to pay tribute to the careful way in which he has set out his findings of fact and the considerations of law in the case.

It is unnecessary for me to decide any of the other questions raised in this case, either as to the applicability of the exceptions clause or as to the measure of damages.

Question (A) is: "Whether upon the facts found and upon "the true construction of the charterparty the respondents com-"mitted any breach of their obligations under the charterparty." The answer to that question is "No."

Question (B) is: "Whether upon the facts found and upon "the true construction of the charterparty the claimants com-"mitted any breach of their obligations under the charterparty." Mr. Mocatta concedes that that question must also be answered in the negative.

The consequences are that neither the claimants nor the respondents shall be entitled to recover any sum by way of damages and that the claimants and the respondents shall bear the costs of the award equally.

The respondents are entitled to judgment accordingly.

Appeal allowed.

Solicitors: *Edward Thompson & Hauser; Ince & Co.*

C. J. E.

REGINA v. CHANDOR.

C. C. A.

1958
Dec. 1, 2.

Lord Parker C.J., Cassels and Barry JJ.

Criminal Law—Evidence—Child, by—Indecent assaults on children—Schoolmaster accused of offences against three boys—Denial that incidents ever took place—Evidence of succession of incidents given by other boys—Whether relevant.
Criminal Law—Evidence—System.

A schoolmaster was convicted of five offences of indecent assault against three of his pupils, the offences being alleged to have taken place over a period of two years. The defence was a complete denial that the alleged incidents had ever occurred. There was no corroboration and the recorder directed the jury that evidence of a succession of incidents might help them to determine the truth of the matter, provided that they were satisfied that there was no collaboration between the children to put up a false story, and that in considering the evidence of one boy (as to assaults on him) they were entitled to take into account the evidence of the others as to incidents in which they had been involved. He also directed that

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where the defence amounted to innocent association the evidence of one boy as to an assault on him could be supported by that of another. On appeal against conviction on the ground of misdirection:—

Held, that evidence of a succession of incidents, although it might properly be admissible to help to determine the truth of any incident, for example, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association, had no relevance to determine whether a particular meeting or occasion for an incident ever took place; accordingly, the recorder had misdirected the jury and the convictions must be quashed.

Observations of the Court of Criminal Appeal in *Reg.* v. *Campbell* [1956] 2 Q.B. 432, 438; [1956] 3 W.L.R. 219; 40 Cr.App.R. 95; [1956] 2 All E.R. 272 explained.

APPEAL against conviction.

The appellant, Kenneth Francis Chandor, aged 29, a schoolmaster at a boys' secondary school and a man of excellent character, was convicted at Croydon Borough Quarter Sessions on October 18, 1958, on five counts of an indictment charging him with indecent assault on male persons under the age of 16. He was sentenced to six months' imprisonment on each count to run concurrently. The alleged offences concerned three different boys, aged between 13 and 15, and were alleged to have been committed by the appellant at various dates between May, 1956, and June, 1958, in different parts of the country, namely, at Caterham, Croydon, and in the Lake District. The appellant's case was that none of the alleged incidents had ever occurred and that they were products of the boys' imaginations. There was no corroboration of any of the alleged incidents and the recorder (Mr. R. M. Wilson Q.C.) gave the proper warning to the jury on that matter. In the course of his summing-up he directed the jury that where there was evidence of a succession of cases it might help them to determine the truth of the matter provided that they were satisfied that there was no collaboration between the boys to put up a false story, and that, in considering the evidence of one of the boys (Edwards) they were entitled to take into account what the other two boys had said. He also directed that in any case where the real defence was that there was a perfectly innocent meeting with a boy the evidence of other boys could be taken into account to rebut the defence of innocent behaviour. The relevant passages of the summing-up are fully set out in the judgment.

The appellant appealed against conviction on the ground of misdirection by the recorder.

Neil McKinnon Q.C. and *Daniel Hollis* for the appellant. It is common ground that the effective direction on which the jury convicted was the passage in the summing-up where, although there was no striking similarity between the alleged offences, the recorder said that evidence of a succession of incidents could be taken into account to prove the truth of any one incident. In so directing, the recorder followed an observation of Lord Goddard C.J. in *Reg.* v. *Campbell*[1] which purported to give guidance to courts in cases of this character. It is submitted that that passage in Lord Goddard C.J.'s judgment[1] was obiter and was inconsistent with the earlier part of the same judgment. Moreover, it was inconsistent with the decision in *Rex* v. *Bailey*,[2] which, though disapproved in *Rex* v. *Sims*,[3] was expressly approved by the House of Lords in *Harris* v. *Director of Public Prosecutions*[4]: see *per* Viscount Simon.[5] *Rex* v. *Sims*[6] was criticised in *Noor Mohammed* v. *The King*,[7] a decision of the Privy Council. The principle that evidence admissible on one count cannot be admissible on any other count must be paramount. That was decided in the substantive part of the judgment in *Campbell's* case.[8] Lord Goddard C.J.'s later observation[9] was made per incuriam.

As to the direction regarding the defence of innocent association, before that defence need be raised there must be some grounds for suspicion. Here the defence was a complete denial that the alleged incidents ever took place at all, and it was said that each boy's story was a complete fantasy. In the case of a schoolmaster and his pupils it is not necessary to raise the defence of "innocent association." If a schoolmaster's association with his pupils is an "innocent association" which can be rebutted by other boys as to what happened to them on other occasions, the effect will be that a schoolmaster can never be acquitted of a false charge. That could be the effect of a misreading of the dicta in *Campbell's* case.[9]

[LORD PARKER C.J. That is reading something more into *Campbell's* case[9] than was there.]

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[1] [1956] 2 Q.B. 432, 438; [1956] 3 W.L.R. 219; 40 Cr.App.R. 95; [1956] 2 All E.R. 272.

[2] [1924] 2 K.B. 300; 18 Cr.App.R. 42.

[3] [1946] K.B. 531; 62 T.L.R. 431; 31 Cr.App.R. 158; [1946] 1 All E.R. 697.

[4] [1952] A.C. 694; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044.

[5] [1952] A.C. 694, 712.

[6] [1946] K.B. 531.

[7] [1949] A.C. 182, 194; 65 T.L.R. 134; [1949] 1 All E.R. 365.

[8] [1956] 2 Q.B. 432.

[9] Ibid. 438.

J. L. E. MacManus for the Crown. On the authorities the recorder did all that was required of him and he correctly followed the direction of this court laid down in *Reg.* v. *Campbell*[9] with regard to the relevancy of evidence of other incidents when considering a particular incident in cases of this nature. That passage may be unfortunately worded, but as it stands it covers this case.

[LORD PARKER C.J. Without casting doubt on *Campbell's* case,[9] isn't the passage in the summing-up in this case going too far? It is treating this case as one where the defence was innocent association.]

That particular passage is difficult to understand, but if it were meaningless it could do no possible harm to the defence. The recorder had already given a careful and proper warning on the question of corroboration. There was no misdirection and the appeal should fail.

McKinnon Q.C. was not called upon to reply.

LORD PARKER C.J. stated the facts and continued: The appellant's defence from the outset and at the trial was that the alleged incidents never took place at all, and that the boys' stories were merely products of their imaginations. It is clear, therefore, that a most careful direction was needed as to the admissibility of evidence of other incidents in determining the truth of any one incident.

In the course of his summing-up the recorder pointed out that there was, as indeed was right, no corroboration at all in this case and he gave the jury the usual warning. He then went on to say: "Where there is a series of these incidents deposed to by "witnesses of this kind, where you are told that a succession of "these incidents happened, it may help you to determine the "truth of the matter, provided that you are satisfied that there "is no collaboration between the children to put up a false story. "That is what the Court of Criminal Appeal has laid down in "1956[1] as a proper direction to give to a jury. You are entitled "to take into account what Smith and Whibley have said in "considering the evidence of Edwards, not as corroboration of "what Edwards has said, because if there are a series of these "incidents you may probably take the fact that there have been "other incidents deposed to to help you to dispose satisfactorily "of the issue, provided you are satisfied there has not been any

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[9] [1956] 2 Q.B. 432, 438.

"collaboration between the children to put up a false story." A little later on he said: "I should also tell you there is another "phase of the present case which you are entitled to take into "account in dealing with any one incident; for example, in one "of the assaults deposed to by Edwards you are entitled to take "the evidence of the other witnesses into account, and that is in "relation to any case where it can be said that the real defence "was not 'I was not there; I never was anywhere near the place,' "but that this was a perfectly innocent meeting with the boy; "you are entitled to take that into account to see whether that "rebuts the defence of innocent behaviour."

Those two passages in the summing-up were undoubtedly based on a passage in the judgment of this court in *Reg.* v. *Campbell.*[1] That case dealt only with questions of corroboration, but at the end of the judgment Lord Goddard C.J. added this[2]: "As we are endeavouring in this judgment to deal comprehensively with the evidence of children, we may perhaps endeavour "to give some guidance to courts who have from time to time "to deal with cases of sexual assaults on children where the "evidence of each child deals only with the assault on himself "or herself. In such cases it is right to tell a jury that because "A says that the accused assaulted him, it is no corroboration "of his evidence that B says that he was also the victim of a "similar assault though both say it on oath. At the same time, "we think a jury may be told that a succession of these cases "may help them to determine the truth of the matter provided "that they are satisfied there is no collaboration between the "children to put up a false story. And if the defence is one of "innocent association by the accused with the children, *Rex* v. "*Sims*,[3] subsequently approved on this point by the House of "Lords in *Harris* v. *Director of Public Prosecutions*,[4] shows "that such evidence can be given to rebut the defence."

The first part of that passage, before the reference to a defence of innocent association, is in very general terms. Unqualified it would appear to cover a case where the accused was saying that the occasion for the incident in question never took place at all. To take an incident in the present case, the appellant said that in respect of an alleged offence with one of the boys—I think it was

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[1] *Reg.* v. *Campbell* [1956] 2 Q.B. 432; [1956] 3 W.L.R. 219; 40 Cr.App.R. 95; [1956] 2 All E.R. 272.

[2] [1956] 2 Q.B. 432, 438.

[3] [1946] K.B. 531; 62 T.L.R. 431; 31 Cr.App.R. 158; [1946] 1 All E.R. 697.

[4] [1952] A.C. 694; [1952] 1 T.L.R. 1075; [1952] 1 All E.R. 1044.

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Edwards at View Point in the Lake District—he, the appellant, had never met the boy at View Point at all. Yet, if this passage in *Reg.* v. *Campbell*[5] is unqualified, it would apply to just such a case. We do not think that the passage in *Campbell*[5] was ever intended to cover that. Indeed, so far as we know, the authorities have never gone so far as that, nor do we see how they could. Evidence that an offence was committed by the appellant against one boy at Croydon could not be any evidence that he met another boy in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all.

That is sufficient to dispose of this case, and it is unnecessary to deal with the second passage in the summing-up in respect of a defence of innocent association. We would only observe that in the case of a schoolmaster and his pupil there may be nothing suspicious in the association which calls for explanation. However, having regard to the view we have taken as to the passage in *Campbell's* case[5] and the summing-up based thereon it is unnecessary to deal with that. It follows that the convictions must be quashed and the appeal allowed.

Convictions quashed.

Solicitors: *Craigen, Wilders & Sorrell, Wood Green; Director of Public Prosecutions.*

E. M. W.

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[5] [1956] 2 Q.B. 432, 439.

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